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No. 285

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

J. H. BAUMANN and MARGUERITE MARIE JACOBSON,
APPELLANTS,

vs.

ROBERT V. SMRHA, as Chief Engineer of the Division of Water Resources of the Kansas State Board of Agriculture,
DEFENDANT-APPELLEE,

and

THE CITY OF WICHITA, KANSAS, a Municipal Corporation,
INTERVENER-APPELLEE.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS, 3-JUDGE COURT.

JURISDICTIONAL STATEMENT.

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KANSAS LAW PUB. CO., TOPEKA

INDEX.

	Page
Introduction	1
Opinion Below	2
Jurisdiction	2
Questions Presented	3
Statement of the Case	4
Findings of Fact	6
The Questions are Substantial	13
What were Appellants' Vested Property Rights in the Waters of the Equus Beds Prior to the Water Appropriation Act of 1945?	18
Notice and an Opportunity to be Heard are Mandatory	15
Just Compensation is Required	17
Deprivation of Property Cannot be Accomplished by Legislative Fiat or Administrative Action	19
Denial of Adequate Remedy Denies "Due Process"	24
Title of Act is Fatally Defective	40
Conclusion	42
Appendix A	45
Appendix B	61
Appendix C	77

INDEX TO AUTHORITIES.

Cases. Page

Bowman v. Middleton, 1 Bay (So. Car.) 252..... 17
Bull v. International Alliance, 119 Kan. 713, 717; 241 Pac. 459 35
Calder v. Bull, 3 Dallas 386, 388; 1 L. Ed. 648, 649.. 15
C. B. & Q. R. Co. v. Chicago, 166 U. S. 226, 236; 41 L. Ed. 979, 984.....15, 16, 17, 27, 28
Citizens' Savings & Loan Assn. v. Topeka, 20 Wall. 655; 22 L. Ed. 455.....13, 15
Coe v. Armour Fertilizer Works, 237 U. S. 413, 424; 59 L. Ed. 1027, 1032..... 23
Colorado v. Kansas, 320 U. S. 383; 88 L. Ed. 116.... 19
County of Sedgwick v. Bailey, 13 Kan. 600, Dassler's 2d Ed., 13 Kan. 446, 451..... 40
Fall River Valley Irrig. Dist. v. Mt. Shasta P. Corp., Cal., 259 Pac. 444; 56 A.L.R. 564..... 29
Fletcher v. Peck, 6 Cranch 87, 139; 3 L. Ed. 162, 179 .....14, 15
Gerlach Live Stock Co., 339 U.S. 725; 94 L. Ed. 1231 13
I. C. C. v. Louisville & N. R. Ry. Co., 227 U.S. 88; 57 L. Ed. 431..... 22
Irrigation Co. v. Klein, 63 Kan. 484, 488; 65 Pac. 684 .....20, 34
Jones v. S. E. C., 298 U.S. 1, 24; 80 L. Ed. 1015, 1025 .....14, 25, 31
Kansas v. Colorado, 185 U.S. 125; 46 L. Ed. 838..... 19
Kansas v. Colorado, 206 U.S. 46; 51 L. Ed. 956..... 19
Louisville & Nashville RR. Co. v. Garrett, 231 U.S. 298; 58 L. Ed. 229..... 3
Marbury v. Madison, 1 Cranch 137, 176; 2 L. Ed. 60, 73 .....17, 39
Morgan v. U. S., 307 U.S. 1; 82 L. Ed. 1129.....22, 25
Murrison v. Fenstermacher, 166 Kan. 568; 203 Pac. 2d 160 37
Ohio Oil Co. v. Indiana, 177 U.S. 190; 44 L. Ed. 729.. 21

AUTHORITIES—(Continued)

Page

Pacific Teleph. & Teleg. Co. v. Kuykendall, 265 U.S. 196; 68 L. Ed. 975 39
Penn. Coal Co. v. Mahon, 260 U.S. 393, 416; 67 L. Ed. 322, 326 ..... 14, 31
Poindexter v. Greenhow, 114 U.S. 270, 298; 29 L. Ed. 185, 195 ..... 15, 32
Pumpelly v. Canal Co., 80 U.S. 166; 20 L. Ed. 557, 560 ..... 26, 28

Query v. U. S., 316 U.S. 486; 86 L. Ed. 1616 3

Radio Corp. of America v. U. S., 341 U.S. 412; 95 L. Ed. 1062, 1068, note 4 2
R. R. Commission v. Pacific Gas Co., 302 U.S. 388, 391; 82 L. Ed. 319, 321 3

St. Germain Irrig. Co. v. Hawthorn Ditch Co., 32 S. D. 260; 143 N.W. 124 42
St. John v. Wisconsin Employment Relations Board, 340 U.S. 411, 414; 95 L. Ed. 386, 388 2
St. Joseph & D. C. R. Co. v. Callender, 13 Kan. 496 (Dassler's 2d Ed., 13 Kan. 370) 27
San Bernardino v. Riverside, 186 Cal. 7; 198 Pac. 784 30
Savings & Loan Assn. v. Topeka, 20 Wall. 655; 22 L. Ed. 455 ..... 13, 15
Seibert v. U. S., 122 U.S. 284; 30 L. Ed. 1161, 1165 .. 35
Southern Ry. Co. v. Virginia, 290 U.S. 190; 78 L. Ed. 260 22
State, ex rel. v. Bancroft, 148 Wis. 124; 134 N.W. 330; 38 L.R.A. N.S. 526 28
State, ex rel. v. Board of Agriculture, 158 Kan. 603; 149 Pac. 2d 604 18
State, ex rel. v. Knapp, 167 Kan. 546; 207 Pac. 2d 440 ..... 10, 28, 40
State v. Sholl, 58 Kan. 507; 49 Pac. 668 40
Sturr v. Beck, 133 U.S. 541, 551; 33 L. Ed. 761, 765 .. 15

AUTHORITIES—(Continued).

Page

Thompson v. Consolidated Gas Utilities Corp., 300 U.S. 55, 79, 80; 81 L. Ed. 510, 523, 524..... 13

Twining v. New Jersey, 211 U.S. 77; 53 L. Ed. 97, 107 37

Wallace v. Winfield, 96 Kan. 35, 149 Pac. 693..... 34

Statutes.

General Statutes of Kansas, 1949:

82a-Art. 7 (Appendix B, 1, 2, 4).....2, 3, 5

82a-702 28

82a-712 38

82a-716 .....27, 38

U.S.C. Title 28, Secs. 1253, 1331, 2201, 2281, 2284.... 2, 4

Laws of 1901, Ch. 425..... 19

Laws of 1945, Ch. 390.....2, 3, 41

Texts.

Farnham, Water & Water Rights, Vol. 1, Ch. v; Vol. 11, Sec. 462..... 13

Long on Irrigation, Sec. 166..... 13

16 A C.J.S. 99..... 15

16 A C.J.S. 108..... 15

12 Am. Jur. 267..... 22

12 Am. Jur. 269..... 22

28 Am. Jur. 202..... 33

28 Am. Jur. 242..... 33

28 Am. Jur. 376..... 3

Constitution.

Kansas Constitution, Art. 2, Sec. 16..... 40

Kansas Constitution, Sec. 18..... 24

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS, 3-JUDGE COURT.

JURISDICTIONAL STATEMENT.

INTRODUCTION.

Appellants appeal from the final judgment of a 3 Judge United States District Court (District of Kansas) entered on April 30, 1956, dismissing the Complaint. The cause was submitted to and decided by the Court on Motions for Summary Judgment.

Suit was brought challenging the validity of what is commonly known as the Kansas Water Appropriation Act of 1945, enacted as Chapter 390, Kansas Session Laws of 1945 (now appearing as General Statutes of Kansas 1949, Chapter 82a, Article 7) under the Federal Constitution.

The 3 Judge District Court held the Act to be valid.

OPINION BELOW.

The opinion of the 3 Judge District Court is reported in....Fed. Suppl..... A copy of the opinion is hereto attached as Appendix A.

JURISDICTION.

This is a suit of a civil nature brought to test the validity, under the Federal Constitution, of the Kansas Water Appropriation Act of 1945 and to restrain the operation, enforcement, and execution thereof under the provisions of 28 U.S.C., Secs. 1331, 2201, 2281 and 2284.

The District Court held the Act to be valid and dismissed the Complaint on April 30, 1956; Notice of Appeal to this Court was filed in the District Court on May 29, 1956.

Jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by 28 U.S.C., Sec. 1253.

The following cases sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case: *Radio Corp. of America v. U. S.*, 341 U.S. 412, 95 L. Ed. 1062, 1068, note 4; *St. John v. Wisconsin*

Employment Relations Board, 340 U.S. 411, 414; 95 L. Ed. 386, 388; *Query v. U. S.*, 316 U.S. 486; 86 L. Ed. 1616. See also 28 Am. Jur. 376, Injunctions Sec. 187 and cases cited.

Jurisdiction extends to all questions involved. *Louisville & Nashville Railroad Company v. Garrett*, 231 U.S. 298; 58 L. Ed. 229; *R. R. Commission v. Pacific Gas Co.*, 302 U.S. 388, 391; 82 L. Ed. 319, 321.

The state statute involved is: Chapter 390, Kansas Session Laws 1945 (now appearing as General Statutes of Kansas, 1949, Chapter 82a, Article 7). Inasmuch as the statute is lengthy, it is set forth in full in Appendix B hereto. Also attached, as a part of Appendix B, is the procedure under the Act as regulated by the Chief Engineer.

QUESTIONS PRESENTED.

1. May a State statute divest a landowner of historically and uniformly recognized and established vested property rights in water, or in the use thereof, and dedicate the use thereof to the public without violating the Fourteenth Amendment to the Federal Constitution?

2. May a State statute, under the guise of being a regulatory statute, divest a landowner of his vested property right in water, or of his vested right to the use thereof, and grant right of use thereof to others without violating the Fourteenth Amendment to the Federal Constitution?

3. May a State, by means of permits from and orders by a state official, grant rights in water to non-owners thereof without notice to or an opportunity to be heard by the owner and without condemnation proceedings without violating the Fourteenth Amendment?

4. May a State divest an owner of his property (and give such property right to another) by cutting down his ownership to a mere right of action for damages?

5. May a State divest an owner of his vested property right in water, or in the use thereof, without notice or an opportunity to be heard and also deny him an effective adequate remedy?

6. May a State cut off a previously vested property right in water, or in the use thereof, without requiring condemnation thereof and deny the owner the right to put such water to a beneficial use?

STATEMENT OF THE CASE.

This action was instituted on August 16, 1955, in the above court, by J. H. Baumann and Marguerite Marie Jacobson, plaintiffs, under the provisions of 28 USC Secs. 1331, 2201, 2281, and 2284, against Robert V. Smrha, defendant, Chief Engineer of the Division of Water Resources of the Kansas State Board of Agriculture. This action arises under the Fourteenth Amendment to the Constitution of the United States.

The action was brought for the purpose of obtaining a declaratory judgment that the Kansas Water Appro-

priation Act of 1945 (G.S. 1949, Ch. 82a, Art. 7), hereinafter referred to as the Act, violated the Fourteenth Amendment to the Constitution of the United States, and is, therefore, null and void; for an injunction restraining the defendant from enforcing, operating under, or executing said Act; and requiring defendant to revoke and nullify any and all permits, vested right orders, or other actions and decisions heretofore taken or entered by him under or pursuant to said Act. (Rec. 1)

On September 9, 1955, an order was entered in the case, constituting a three-judge court. (Rec. 7) On October 13, 1955, the City of Wichita, Kansas, hereinafter referred to as the City, with the leave of court, intervened in the action and filed an answer. (Rec. 10, 11) Pursuant to an order entered on September 26, 1955, a hearing was had before the three-Judge court on October 21, 1955. (Rec. 8) At this hearing it was agreed that the court would not attempt to adjudicate any liability of the City to the plaintiffs. Certain irrigation districts and Earl C. Brookover were granted leave to file briefs as "friends of the Court" in support of the defendant's position that the statute is valid. The Committee of Kansas Farm Organizations was also granted leave to file a brief as a "friend of the Court" in support of plaintiffs' contention. Certain facts were stipulated and certain exhibits were introduced in evidence. The parties then agreed in open court that there no longer remained any controverted issue of fact and both plaintiffs and defendant orally moved for summary judgment. (Trans. 48, 49)

FINDINGS OF FACT.

The District Court found the facts to be as follows: (Rec. 26) (Appendix A, pages 45-59 et seq.)

"The plaintiff, J. H. Baumann, is the life tenant, and the plaintiff, Marguerite Marie Jacobson, is the remainder owner of the fee title to certain lands situated in Harvey County, Kansas, on the south boundary line of said county, three miles west and two miles north of the Town of Bentley; to wit, the southwest quarter of Section 32, Township 24 South, Range 2 West of the Sixth Principal Meridian. The title to such lands, now owned by plaintiffs, passed from the United States into private ownership during the year 1880 and the plaintiff, Baumann, acquired it in 1930.

Such lands are located in what is known as the "Equus Beds," a geological formation containing water of a quality suitable for domestic, municipal, irrigation, and other purposes. The Equus Beds is a ground water reservoir composed of extremely permeable gravel and sand, occupying the channel of an ancestral Smoky Hill River, which flowed into an ancestral Arkansas River. Such Beds cover an area extending approximately 55 miles north and south between Wichita and Lindsborg and approximately 25 miles east and west and located principally in the Counties of Sedgwick, Harvey, and McPherson, in the State of Kansas. The ground water within the reservoir moves generally toward the Little Arkansas River, except in the northern part, where there is a movement toward the Smoky Hill River. There has been and now is a "draw-down" of the water table under plaintiffs' lands. *Such Beds provide natural sub-irrigation for plaintiffs' lands and plaintiffs have been and are using Equus Beds water for domestic purposes.*

It has been estimated on the basis of test drilling that the part of this ground water reservoir between

the Towns of McPherson and Valley Center contained millions of acre feet of water in storage under natural conditions. This ground water is recharged chiefly by direct precipitation. Detailed studies made from 1938 to 1944 showed that most of the natural discharge from the ground water reservoir occurred by evapo-transpiration in areas where the depth of water was less than 20 feet.

In 1940, the City acquired by purchase for municipal water supply 25 five-acre well sites in Harvey County, located three to ten miles east and northeast of plaintiffs' lands and thereafter the City purchased other well sites. Thereafter, the City drilled and equipped water wells thereon and commenced pumping water therefrom for use by the inhabitants of the City and its environs. The water levels of the Equus Beds have declined since the City drilled wells in 1940 and the water table might have declined as much as four feet without pumping, because of drought, *but the rest of the decline must be attributed to pumping, chiefly by the City.*

At the present there are more than 200 water wells in addition to the City's wells that are located in the general area of plaintiffs' lands, at least 14 being located nearer to plaintiffs' lands than any of the City's wells. *Since 1945, the operations of the City and others, pursuant to certain permits and orders issued by the defendant, have withdrawn and are withdrawing water from the Equus Beds.*

The defendant is the duly appointed, qualified and acting Chief Engineer of the Division of Water Resources of the Kansas State Board of Agriculture, and is the official charged with certain duties and authorities in connection with the administration of the Act.

By reason of the operations of the City, *pursuant to said permits and orders of defendant, plaintiffs'*

lands have been affected to a considerable extent and will continue to be more seriously affected if said City is permitted to continue to withdraw water from under plaintiffs' lands. From January, 1952, to October 1, 1954, the water table under plaintiffs' lands declined approximately four feet. From October 1, 1954, to July 1, 1955, the water table level under plaintiffs' lands and other lands in the same general area remained almost constant. The water table under all lands in the same general area similarly declined.

The Kansas legislature has taken cognizance of apparent damages to landowners by reason of granting permits for appropriating water for beneficial use and of questions of *the constitutionality of the Act,* arising *because of inadequate provisions as to notice to and for compensation of landowners and persons owning vested water rights.* The Kansas Legislative Council reported that procedural aspects of the Act needed correction to insure notice and hearing.

The people who depend upon the Equus Beds for water have the immediate problems which accompany increased use of any reservoir—water holes have gone dry, shallow wells have been deepened, many wells now obtain water of poorer quality, and some crops have undoubtedly been reduced in area where the water table was once near enough to the surface to be reached by the plants.

At the end of 1951, the water table was higher throughout the well-field area than at the end of 1954, and at the end of that wet year, it was significantly lower than in 1940, throughout an area of 45 square miles, and the decline exceeded 10 feet in an area of 11 square miles, and in certain locations 20 feet. This area of depression had been expanding and deepening ever since pumping began in 1940, partly because

of the progressive increase in pumpage from 1940 to 1951.

Plaintiffs' land is located in the City's proposed and pending well-field application for 25,000 additional acre feet of water per year." (Emphasis supplied)

The title to the lands now owned by appellants not only passed from the United States to private ownership during the year 1880 but, as a matter of fact, they were entered upon, under the Homestead Laws, on May 12, 1872.

The following finding of fact, made by the District Court, is not sustainable under the facts, but is directly contrary to all of the stipulated facts:

"At present there are more than 200 water wells in addition to the City's wells that are located in the general area of plaintiffs' lands, at least 14 being located nearer to plaintiffs' lands than any of the City's wells."

A glance at Exhibits "A"-"F" immediately discloses that there are only six irrigation wells within the area between the Little Arkansas River and the Arkansas River and that all of such wells are north and east of Wichita's wells. None of them are even close to the appellants' lands. Granted, there are a number of purely domestic wells in the area but none of them have ever had, or do now have, any adverse effect upon these appellants. The District Court must have misconstrued the exhibits and assumed that the observation wells were pumped. However, there is no pumpage from the observation wells at any time.

A mere glance at Exhibit "J" (or Exhibit No. 9) shows that during dry years, or during increased pumpage, that the speed of increase in draw-down was very rapid and it is obvious that additional pumpage will increase such draw-down.

The District Court cited the case of *State, ex rel. v. Knapp,* 167 Kan. 546; 207 Pac. 2d 440. However a closer examination of the opinion discloses two critical features of that case:

> 1. "We next observe that *no complaint* is made of section 702, which declares: 'All water within the state of Kansas is hereby dedicated to the use of the people of the state, subject to the control and regulation of the state in the manner herein provided.' ***This is the heart of the statute.*** The rest of it treats of details and procedure." (P. 555) (Emphasis supplied)
>
> 2. "We have difficulty in seeing that the owner of land in Kansas riparian to the Republican river has a vested interest ***in floodwaters*** of the river impounded in the Harlan dam, eighty miles or more from his property. . . . " (p. 555) (Emphasis supplied)

It is apparent that the Kansas Supreme Court did not, and has not, passed upon the prime objection to the act advanced by these appellants, to wit: "the state cannot take appellants' property by legislative fiat"; nor did the Kansas Supreme Court pass upon the constitutionality of the Water Appropriation Act of 1945 in the light of the Federal Constitution.

All the parties involved, including the defendant, intervener, and amici curiae, agree that the equus beds is

a "groundwater" reservoir composed of permeable gravel and sand; that it *occupies the channel* of an ancestral Smoky Hill River which flowed into an ancestral Arkansas River; that its direction of flow and lateral limits are definitely known; that its source of recharge, as is the general location of the points of natural discharge into surface streams, are also known. Therefore, it is apparent that the "equus beds" is, in actual fact, a subterranean stream that flows in a known channel, regardless of the speed or slowness of the flow. There is no question then of the Court being asked to deal with an unknown quantity or with unknown results of given activities.

The Chief Engineer, on May 18, 1954, denied numerous landowners in the equus beds area any *statutory* "vested rights" under the Water Act of 1945, *even though* the Chief Engineer did recognize that the landowners of the equus beds had been, and were, making use of equus beds water by the *natural process* of sub-irrigation.

> " . . . sub-irrigation is not 'actual application' under the Chief Engineer's administrative interpretation of the act and because the water *so used* is not susceptible of measurement as to quantity of water used and the rate of diversion thereof as contemplated by Section 4 of the act, therefore neither A. B. Williams nor any of the other claimants mentioned in "Exhibit A" attached hereto has made any actual application of water for beneficial use in the sub-irrigation of crops and other vegetation upon their respective premises within the meaning of the words 'having actually been applied', within the purview of the statutory definition of 'vested right'; and that,

therefore, said claimants *do not have any vested right by reason of sub-irrigation.*" (Excerpt from order of Chief Engineer under date of May 18, 1954) (Emphasis supplied)

It is, therefore, clearly apparent that the Water Act has not been construed to recognize undisputed facts. On the contrary, such Act has been construed to deny the undisputed and indisputable fact that these appellants and other landowners in the area had been making use of equus beds water.

Appellants' position is critical at the present time, but a quick glance at Exhibit "K" (or 10) shows that these appellants and other landowners in the area are facing complete ruination if the Water Act is upheld and Wichita's pending application for 25,000 additional acre feet of water per year is granted.

Exhibit "K" (or 10) shows that appellants' land is located not only *between* the present and proposed well-field, but actually is *in* the proposed additional well-field.

Furthermore, it is of extreme importance to remember that Wichita not only *takes* appellants' water but *sells* it, all the while causing serious damage to crops and land values. Other appropriators of appellants' water, actual or potential, obviously also want it for the purpose of making or increasing their own profits.

If the Water Appropriation Act of 1945 is valid, then appellants and other landowners will eventually be destroyed by drainage of water, vital to them and their lands, in order that Wichita and other appropriators may

prosper,—all without notice, opportunity to be heard and without compensation to these appellants and other landowners!

THE QUESTIONS ARE SUBSTANTIAL.

This Appeal presents questions of vital concern to every State and to every property owner subject to or protected by the Federal Constitution.

Deprivation of water or the use thereof is tantamount to taking the land itself—without water land is worthless.

This and all other courts have repeatedly and uniformly held that water or the right to the use of water is "property" within the constitutional provision against deprivation thereof. See *Long on Irrigation*, Sec. 166 et seq.; *Farnham, Water & Water Rights*, Vol. 1, Chapter V; Vol 11, Sec. 462; *Gerlach Live Stock Co.*, 339 U. S. 725; 94 L. Ed. 1231.

No State may enact legislation which has the effect of taking one man's property and giving it to another. *Thompson v. Consolidated Gas Utilities Corp.*, 300 U.S. 55, 79, 80; 81 L. Ed. 510, 523, 524. This Court in the case of *Citizens' Savings & Loan Assn. v. Topeka*, 20 Wall. 655; 22 L. Ed. 455, said:

> "There are limitations on such power which grow out of the essential nature of all free governments. Implied reservations of individual rights, without which the social compact could not exist, and which are respected by all governments entitled to the name. No court, for instance, would hesitate to declare *void* a statute which enacted that A and B who were husband and wife should be so no longer,

but that A should thereafter be the husband of C, and B the wife of D. Or *which should enact* that the homestead *now owned* by A *should no longer be his*, but should *henceforth be the property* of B." (Emphasis supplied)

See also *Fletcher v. Peck*, 6 Cranch 87, 139; 3 L. Ed. 162, 179:

> "It is, then, the unanimous opinion of the court, that, in this case, the estate having passed into the hands of a purchaser for a valuable consideration, without notice, the state of Georgia was restrained, either by general principles, which are common to our free institutions, or by the particular provisions of the constitution of the United States, from passing a law whereby the estate of the plaintiff in the premises so purchased could be constitutionally and legally impaired and rendered null and void."

Especially is this true where appellants' predecessors in interest obtained title to the property by patent from the United States (Patent issued in 1880—entry under homestead law made May 12, 1872) *and not from the State of Kansas.* At no time did the State of Kansas have any right, title, estate or interest in and to the lands of appellants.

Alleged "necessity" or purported "progress" cannot justify disregard of the Constitutional guarantees. This Court, speaking through Justice Holmes, in the case of *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 416; 67 L. Ed. 322, 326, said:

> "In general it is not clear that a man's misfortunes or necessities will justify his shifting the damages to his neighbor's shoulders . . . We are in

> danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change."

Once property rights have attached, they cannot be subsequently invaded. *Sturr v. Beck,* 133 U.S. 541, 551; 33 L. Ed. 761, 765. Especially see *Fletcher v. Peck,* 6 Cranch 87, 139; 3 L. Ed. 162, 179, *supra.*

No legislature may constitutionally enact any law disturbing or destroying existing or vested rights, whether such rights be statutory or embodied in judgments or judicial decisions. (16 A C.J.S. 99, Constitutional Law, Sec. 417); nor may a legislature so impair an existing remedy so as to destroy or materially impair such vested rights. (16 A C.J.S. 108, Constitutional Law, Sec. 418; *Fletcher v. Peck,* 6 Cranch 87, 139; 3 L. Ed. 162, 179, *supra; Savings & Loan Assn. v. Topeka, supra; Poindexter v. Greenhow,* 114 U.S. 270, 298; 29 L. Ed. 185, 195; *C. B. & Q. R. Co. v. Chicago,* 166 U.S. 226; 236; 41 L. Ed. 979, 984.

In the case of *Calder v. Bull,* 3 Dallas 386, 388; 1 L. Ed. 648, 649, this Court said:

> "There are acts which the *Federal* or *State,* Legislature cannot do, *without exceeding their authority.* There are certain *vital* principles in our *free Republican governments,* which will determine and overrule an *apparent and flagrant* abuse of *legislative* power; as to authorize *manifest injustice by positive law;* or to take away that security for *personal liberty,* or *private property,* for the protection whereof the government was established. An ACT of the

Legislature (for I cannot call it a *law*) contrary to the *great first principles* of the *social compact*, cannot be considered a *rightful exercise of legislative* authority. The obligation of a law in governments established on *express compact, and on republican principles*, must be determined by the *nature* of the *power*, on which it is founded. A few instances will suffice to explain what I mean. A law that punished a citizen for an *innocent* action, or, in other words, for an act, which, when done, was in violation of no *existing* law; a law that destroys, or impairs, the *lawful private* contracts of citizens; a law that makes a man a *Judge in his own cause;* or a law that takes *property* from A. and gives it to B. It is against all reason and justice, for a people to entrust a Legislature with SUCH powers; and, therefore, it cannot be presumed that they have done it. The *genius*, the *nature*, and the *spirit*, of our State Governments, amount to a prohibition of *such acts of legislation;* and the *general principles of law and reason* forbid them. The Legislature may enjoin, permit, forbid, and punish; they may declare *new* crimes; and establish rules of conduct for *all* its citizens in *future* cases; they may *command* what is right, and *prohibit* what is wrong; but they cannot change *innocence* into *guilt;* or punish *innocence* as a *crime;* or violate the right of an *antecedent lawful private contract;* or the *right of private property*. To maintain that our Federal, or State, Legislature possesses *such powers*, if they had not been *expressly* restrained, would, in my opinion, be a *political heresy*, altogether inadmissible in our *free republican governments*."

In the case of *C. B. & Q. R. Co. v. Chicago*, 166 U.S. 226, 236; 41 L. Ed. 979, 984, this Court said:

"But if, as this court has adjudged, a legislative enactment, assuming arbitrarily to take the property

> of one individual and give it to another individual, would not be due process of law as enjoined by the 14th Amendment, it must be that the requirement of due process of law in that Amendment is applicable to the direct appropriation by the state to public use and without compensation of the private property of the citizen."

The above limitations on the power of a Legislature is but another way of saying "No state may deprive any person of life, liberty or property without due process of law". It but expresses the principle upon which the constitutional provision rests. *C. B. & Q. R. Co. v. Chicago,* 166 U.S. 226, 235; 41 L. Ed. 979, 984 et seq.

Therefore, any law which attempts to impair or destroy a vested right is absolutely void. ***Marbury v. Madison,*** 1 Cranch 137, 176; 2 L. Ed. 60, 73.

One of the earliest reported cases, ***Bowman v. Middleton,*** 1 Bay (So. Car.) 252, decided in 1792, held that an act of the assembly passed in 1712 purporting to transfer title to land from one person to another was null and void and time could give it no validity. The Court said:

> ". . . plaintiffs could claim no title under the act in question, as it was against common right, as well as against *magna charta,* to take away the freehold of one man and vest it in another, and that, too, to the prejudice of third persons, without any compensation, or even a trial by the jury of the country, to determine the right in question. That the act was, therefore, *ipso facto* void; that no length of time could give it validity being originally founded on erroneous principles."

The question thus arises:

WHAT WERE APPELLANTS' VESTED PROPERTY RIGHTS IN THE WATERS OF THE EQUUS BEDS PRIOR TO THE WATER APPROPRIATION ACT OF 1945?

Fortunately, the Kansas Supreme Court had occasion to, and did, examine and determine those rights in the case of: *State ex rel. v. Board of Agriculture,* 158 Kan. 603; 149 Pac. 2d 604. The Intervener-Appellee, the City of Wichita, not only precipitated that case but actively participated therein.

The opinion in that case, because of its comprehensive review of the Kansas decisions and statutory law pertaining to water, is attached hereto as Appendix C.

After full review of the history of Kansas Water Law, the Supreme Court in *State ex rel. v. Board of Agriculture,* 158 Kan. 603; 149 Pac. 2d 604, at page 609 said:

> "Under the above authorities *underground waters are part of the real property* in which they are situated. The owner of land *may convey or grant* the underground water, or the right to take it from the land, by an appropriate instrument in writing to the *same extent* that he *might convey* or grant *any other portion of the real property;* or a party, having the right of eminent domain, may appropriate underground water to his use by condemnation proceedings." (Emphasis supplied)

and on page 610 said:

> "Our statutes pertaining to waters, their ownership, disposition and use have been builded about

> the common-law doctrines enumerated in the decisions above set out. . . . Each of these statutes, however, recognized the common-law doctrine of the right of the landowner to the running waters or the underground waters on his land, *and required others who desired to use such waters to obtain the right to do so by contract or by condemnation proceedings.*" (Emphasis supplied)

Kansas has not only recognized the common-law doctrine of "riparian rights" and ownership of underground water by judicial decision and statute, but has *actively and aggressively insisted upon them* in its own behalf and on behalf of landowners of Kansas.

The Kansas-Colorado litigation in this Court was a burning issue for many years and is still an issue in the mind of most of the people of Kansas. See 185 U.S. 125; 46 L. Ed. 838; *Kansas v. Colorado,* 206 U.S. 46; 51 L. Ed. 956; *Colorado v. Kansas.* 320 U.S. 383; 88 L. Ed. 116.

The legislature, by senate concurrent resolution No. 14, appearing as Chapter 425, Kansas Session Laws of 1901, adopted the following:

> "Whereas, it is a matter of common notoriety that the waters of the Arkansas river for some time past have been and are now being diverted from their natural channel by the state of Colorado and its citizens, to the great damage of the state of Kansas and its inhabitants; and
>
> Whereas, it is threatened not only to continue but also to increase said diversion: Therefore, be it
>
> *Resolved, by the Senate, the House of Represen-*

> *tatives concurring therein,* That the attorney general be requested to institute such legal proceedings, and to render such assistance in other proceedings brought for the same purpose, as may be necessary to protect the rights and interests of the state of Kansas and the citizens and property owners thereof."

and thereafter in numerous legislative sessions appropriated money for the prosecution of the original case and for the defense of the later case.

In view of such a history, there can be no question that *appellants' property rights were fully and completely vested long prior to 1945,* and were not subject to being disturbed or taken away by legislative fiat or any other process than "due process of law". The 14th Amendment to the Federal Constitution expressly forbids any legislation having such a result.

Long ago in the case of *Irrigation Co v. Klein,* 63 Kan. 484, 488; 65 Pac. 684, the Supreme Court of Kansas said:

> "It is a basic principle of our form of government that no person can be deprived of life, liberty or property except by due process of law. It is equally fundamental that the legislature possesses no power to take the property of any one and give it to another for the advancement of simply private objects. To argue these propositions or state authorities in their support would be but a pedantic display of learning. It is equally well settled that the legislature may authorize the taking of private property by private persons or corporations for public uses, the owner of such property being compensated therefor."

The "Equal Protection" clause of the 14th Amendment also precludes validity to the Water Appropriation Act of 1945. Clearly the intent, purpose and scope of such act purports to impose a limitation on the exercise of a "vested property right" by one landowner, in favor of an expanded exercise of such right not only by another landowner but also in favor even of a non-landowner! It is to be noted that nowhere in the Act is there a requirement of ownership of land!

The Act purports to confer upon the Chief Engineer the power to grant a permit *to anyone* for use of water *any place and for any purpose,* without reference to the land from which the water is to be withdrawn, and, by 82a-716, without even being required to first condemn private rights!

Appellants submit that the Court will find in the records of history no more flagrant violation of the basic concepts of the American way of life (and we further believe, of civilized society).

This Court, in the case of *Ohio Oil Co. v. Indiana,* 177 U.S. 190; 44 L. Ed. 729, while recognizing that legislation can be enacted to prevent destruction of common property by one of the common owners, nevertheless held that such legislation must *protect* all. The theory of *protection* cannot support *confiscation.*

NOTICE AND AN OPPORTUNITY TO BE HEARD ARE MANDATORY.

The very heart of the "due process" clause of the 14th Amendment is the requirement of: notice, an opportunity to be heard, and the chance to defend in an orderly proceeding adopted to the nature of the case before a tribunal having jurisdiction of the cause, (12 Am. Jur. 267, Constitutional Law, Section 573) and it has been uniformly held by the United States Supreme Court and every other Court in the United States that a judgment without such citation and opportunity lacks all the attributes of a judicial determination and it is judicial usurpation and oppression which can never be upheld where justice is fairly enacted. (12 Am. Jur. 269 and cases cited in note 3)

That the guaranty of due process protects property rights, requires no citation of authority. The wording of the 14th Amendment expressly covers "property".

Administrative orders quasi-judicial in character are void if a hearing is denied, or if granted, is inadequate or manifestly unfair (*I.C.C. v. Louisville & N. R. Ry. Co.*, 227 U.S. 88; 57 L. Ed. 431) and any statute which attempts to authorize an administrative official to accomplish such a result is void. (*Southern Ry. Co. v. Virginia*, 290 U.S. 190; 78 L. Ed. 260)

In the case of *Morgan v. U. S.*, 307 U.S. 1; 82 L. Ed. 1129, the United States Supreme Court, in holding void an order of the Secretary of Agriculture for lack of hearing, said:

> ". . . that in administrative proceedings of a quasi-judicial character the liberty and property of the citizen shall be protected by the rudimentary requirements of fair play. These demand "a fair and open hearing,"—essential alike to the legal validity of the administrative regulation and to the maintenance of public confidence in the value and soundness of this important governmental process. Such a hearing has been described as an "inexorable safeguard."

Extra official or casual notice, or a hearing granted as a matter of favor, is not a substitute for the "due process" of law required by the 14th Amendment. (*Coe v. Armour Fertilizer Works*, 237 U.S. 413, 424; 59 L. Ed. 1027, 1032)

Cases from both the United States Supreme Court and other courts to the same effect are legion, but appellants respectfully submit that the principle is fundamental and that the above authorities adequately support the contention.

In the light of the protection thus guaranteed by the 14th Amendment, let us proceed to examine the Water Appropriation Act of 1945 and the practices of the Chief Engineer thereunder.

Nowhere in the Water Act is there the slightest hint of a requirement of notice or of any hearing by or before the Chief Engineer, nor, in practice, does the Chief Engineer give notice to persons who are, or may be, affected by his orders nor does he hold a "hearing".

All proceedings by the Chief Engineer are *ex parte;* no one is even informed of the basis for, or reasons sup-

porting, his decision, yet his "decisions" purport to be binding! And the statute clearly authorizes and supports the practice and procedure adopted by the Chief Engineer.

With respect to "vested right" determinations authorized by 82a-704, there is no suspicion of a requirement of notice, hearing or opportunity to be heard, and, in practice, none is given. The only notice (Exhibit "G") is *after* the decision and *then just to the person named,* accompanied by an unofficial "Abstract of Vested Right" for the particular county involved. These appellants have *never* been officially notified of *any* orders, either "vested" or "appropriative", but learned of the existence of Wichita's alleged rights only casually.

Section 82a-705 through 715 outline the procedure with respect to "appropriations"; again they are completely devoid of a hint of notice, hearing or opportunity to be heard by *anyone,* except the applicant!

Other landowners, including these appellants, even though seriously affected by approval of the application, are neither given, nor are they required to be given notice of the approval of the application!

Where is there *any* suggestion if the "due process" rquired by the 14th Amendment when vested property rights are being or sought to be affected? Neither the Act nor the procedure adopted under the Act make any attempt to require or provide anything remotely resembling "due process". On the contrary the Act requires, or at least permits with its blessing, complete secrecy in *every* vital aspect.

Where are "the rudimentary requirements of fair play and the inexorable safeguards so necessary to the validity of administrative regulations" (cf. *Morgan v. U. S., supra*)

Complete lack of requirements for notice and opportunity to be heard and the arbitrary grants of rights belonging to others, renders the entire Act void.

Furthermore, the Act does not provide for and the Division of Water Resources and the Attorney General contend that an affected landowner has no right to appeal any orders or decisions of the Chief Engineer unless he, the landowner, is the applicant.

JUST COMPENSATION IS REQUIRED.

Appellants respectfully submit that it needs no citation of authority to sustain the above statement. It is fundamental and has been repeatedly recognized by every court in the United States.

It has been demonstrated above that appellants owned the water underlying their land and had a vested property right in the use thereof. The Complaint alleges, the Exhibits demonstrate, the Defendant's Motion for Summary Judgment admits, and common knowledge compels recognition that the Wichita well-field is withdrawing Equus Bed water from a large area, including appellants' land. Such operations are sought to be justified under and pursuant to the Water Appropriation Act of 1945 and the orders of the defendant, Chief Engineer, thereunder.

The case of *Pumpelly v. Canal Co.*, 80 U.S. 166; 20 L. Ed. 557, 560, is particularly applicable. The Court said:

> "It would be a very curious and unsatisfactory result, if in construing a provision of constitutional law, always understood to have been adopted for protection and security to the rights of the individual as against the government, and which has received the commendation of jurists, statesmen and commentators as placing the just principles of the common law on that subject beyond the power of ordinary legislation to change or control them, it shall be held that if the government refrains from the absolute conversion of real property to the uses of the public it can destroy its value entirely, can inflict irreparable and permanent injury to any extent; can, in effect, subject it to total destruction, without making any compensation, because, in the narrowest sense of that word, it is not taken for the public use. Such a construction would pervert the constitutional provision into a restriction upon the rights of the citizen, as those rights stood at the common law, instead of the government, and make it an authority for invasion of private right under the pretext of the public good, which had no warrant in the laws or practices of our ancestors."

Provision must be made for just compensation if the Act is valid; the 14th Amendment will not permit legislation which has the effect of taking one man's property and *giving* it to another.

The United States Supreme Court reviewed a large number of cases in connection with the "just compensation" requirement of the 14th Amendment in the case of *C. B. & Q. Ry. Co. v. Chicago*, 166 U.S. 226, 235; 41 L. Ed. 979, 984, and said:

"The legislature may prescribe a form of procedure to be observed in the taking of private property for public use, *but it is not* due process of law *if provision be* NOT *made for compensation.*" (Emphasis supplied)

The Water Appropriation Act is not only entirely devoid of provision for compensation, just or otherwise, but also expressly states *that condemnation of private rights is* NOT *required!* 82a-716 provides:

". . . An appropriator who has acquired a valid right *under this statute* may prevent by injunction, a subsequent diversion by a common-law claimant of private rights *without being required* to first condemn possible *private rights.*" (Emphasis supplied)

While expressly waiving the requirement of compensation, the Water Act expressly recognizes the existence of affected private rights!

In the early case of *St. Joseph & D. C. R. Co. v. Callender,* 13 Kan. 496, (Dassler's 2d Ed., 13 Kan. 370), the Supreme Court of Kansas, in construing the Kansas Constitution, Article 12, Section 4, held:

"Full compensation must be *first* made in money, or secured by a deposit of money, *before* any right of way can be appropriated to the use of a corporation." (Emphasis supplied)

Not only good law, but the only law consistent with basic principles of fairness and equity! No man should, or under the 14th Amendment, can be required to "chase down" every Tom, Dick and Harry that want to take or use his water, in the hopes that the appropriator is

solvent; it is only too likely he will be "judgment proof"!

Lack of provision for (or rather, a *bar* of) just compensation so permeates the entire Act, that the Act is void *in toto*. (*State ex rel. v. Bancroft*, 148 Wis. 124; 134 N. W. 330; 38 L.R.A. N.S. 526, *infra*)

Deprivation of property cannot be accomplished by legislative fiat or administrative action.

In view of the authorities cited above, the above statement is necessarily included therein. (*C. B. & Q. Ry. Co. v. Chicago*, 166 U. S. 226; 41 L. Ed. 979; *Pumpelly v. Canal Co.*, 80 U. S. 166; 20 L. Ed. 557)

82a-702 puports to declare that "all water within the state of Kansas is hereby dedicated to the use of the people of the state . . . ", and the Supreme Court of Kansas, in the case of *State ex rel. v. Knapp*, 167 Kan. 546; 207 Pac. 2d 440, remarked: "This is the heart of the statute".

The Legislature either does not have the power to take anyone's property and dedicate it to the use of the public, or if it does, then the assumed protection of the 14th Amendment is non-existent.

The Supreme Court of Wisconsin, in the case of *State, ex rel. v. Bancroft*, 148 Wis. 124, 134 N. W. 330, 38 L.R.A. N.S. 526, in holding a somewhat similar effort on the part of the Legislature void, said:

> "The incorporeal rights of a riparian owner are not subject to salable rights of the state, or to any claim of the state to compensation for their use, or

> to any grant of the state to a stranger for the purpose of manufacturing, or of using or selling water power. . . .
>
> If the legislature could, by mere fiat, make any use of property a public use, all private property could in this way be subjected to these drastic regulations, justified by a public use."

and held:

> "A statute for placing all water power of the state under the supervision of a commission, and ultimately placing it in the state or municipality, is void in toto if the provisions providing for the acquisition of the rights of the riparian owner and for compelling him to submit to the provisions of the act are invalid as taking private property without compensation and due process of law."

The Supreme Court of California has also ruled to the same effect. In the case of *Fall River Valley Irrig. Dist. v. Mt. Shasta P. Corp.*, Cal., 259 Pac. 444, 56 A.L.R. 564, the Court said:

> "No question can arise as to the power of the Legislature to modify or abrogate a rule of the common law. The question is: Can any such change affect the previously vested rights of property owners? We need here only say that the legislative department of the state may not take any portion of a vested property right from one person and invest another with it and be justified in so doing in view of the provisions of Sec. 13 and 14 of article I of the state Constitution and the 14th Amendment to the Constitution of the United States. . . .
>
> In the case of Reagan v. Farmers' Loan & T. Co., 154 U.S. 362, 399, 38 L. ed. 1014, 1024, 4 Inters, Com. Rep. 560, 14 Sup. Ct. Rep. 1047, 1055, the court said:

'In every Constitution is the guaranty against the taking of private property for public purposes without just compensation. The equal protection of the laws which, by the 14th Amendment, no state can deny to the individual forbids legislation, in whatever form it may be enacted, by which the property of one individual is, without compensation, wrested from him for the benefit of another, or of the public. This, as has been often observed, is a government of law, and not a government of men, and it must never be forgotten that under such a government, with its constitutional limitations, and guaranties, the forms of law and the machinery of government, with all their reach and power, must in their actual workings stop on the hither side of the unnecessary and uncompensated taking or destruction of any private property, legally acquired and legally held'." (Citing a number of cases from various jurisdictions to the same effect.)

and held:

"A statute declaring waters flowing in a natural channel public and subject to appropriation, so far as they are not being applied to a useful or beneficial purpose, or reasonably needed for such purpose, unconstitutionally deprives riparian owners of their property without due process of law."

In the case of *San Bernardino v. Riverside*, 186 Cal. 7; 198 Pac. 784, the Supreme Court of California discussed riparian rights and the law of California in regard thereto at length, and, in connection with the power of the Legislature to divest vested riparian rights, held that the state cannot do so because the constitution expressly forbids it.

Nor can the constitutional prohibition be circumvented by delegating such arbitrary power to an administrative agency. The Supreme Court of the United States, in the case of *Jones v. S.E.C.*, 298 U.S. 1, 24; 80 L. Ed. 1015, 1025, said:

> "Arbitrary power and the rule of the Constitution cannot both exist. They are antagonistic and incompatible forces; and one or the other must of necessity perish whenever they are brought into conflict. To borrow the words of Mr. Justice Day—'there is no place in our constitutional system for the exercise of arbitrary power.' Garfield v. United States, 211 U. S. 249, 262, 53 L. ed. 168, 174, 29 S. Ct. 62. To escape assumptions of such power on the part of the three primary departments of the government, is not enough. Our institutions muse be kept free from the appropriation of unauthorized power by lesser agencies as well. And if the various administrative bureaus and commissions, necessarily called and being called into existence by the increasing complexities of our modern business and political affairs are permitted gradually to extend their powers by encroachments—even pettly encroachments—upon the fundamental rights, privileges and immunities of the people, we shall in the end, while avoiding the fatal consequences, of a supreme autocracy, become submerged by a multitude of minor invasions of personal rights, less destructive but no less violative of constitutional guaranties."

The remarks of Justice Holmes cited *supra* in the case of *Pennsylvania Coal Co. v. Mahon*, 260 U. S. 393, 416; 67 L. Ed. 322, 326, again, are most pertinent.

Appellants respectfully submit that the Legislature went beyond constitutional limits in enacting the Water

Appropriation Act of 1945, when it forgot that "a strong desire on the part of a few (or many) to improve their position" *is not enough* to warrant the Legislature to permit them to achieve such desire at the expense of persons having and using vested property rights.

If anyone is to obtain vested property rights of others, the Constitution requires compensation first paid or secured.

It may be unhandy to have to pay for a valuable commodity rather than just taking it, or having the state give it to one, but the 14th Amendment was designed *to prevent* just the result attempted to be accomplished by the Water Act.

Denial of adequate remedy denies "due process".

Appellants respectfully submit that to take away the only remedy to enable one to protect a property right is to take away the right itself. Any law that deprives a property owner of the means of protecting his property must necessarily deprive one of his property "without due process of law" and therefore violates the 14th Amendment.

The United States Supreme Court, in the case of *Poindexter v. Greenhow*, 114 U. S. 270; 29 L. Ed. 185, 197, said:

> "To take away all remedy for the enforcement of a right is to take away the right itself. But that is not within the power of the state."

The general rule is stated in 28 Am. Jur. 202, Injunctions, Section 9, thus:

> "The power of courts of equity to issue writs of injunction is an inherent one, existing independent of constitutional or statutory provisions specifically conferring it."
>
> ". . . In recent times legislation has been enacted restricting the use of remedy by injunction particularly in the fields of labor disputes. Such legislation, so far as it *may attempt* to make *legal* what otherwise would *be illegal*, is invalid as depriving the injured party of property without due process of law. The fact that it assumes only to *restrict* the remedy *does not save it* when the effect is to *take away* the *only adequate remedy* against irreparable injury. The fact that the acts complained of were done in furtherance of industrial disputes does not constitute reasonable basis for a classification depriving the defendant of a remedy otherwise available. *State statutes* of this kind may be declared *invalid* also because they undertake to limit the jurisdiction vested in the courts by the *state constitution.*" (Emphasis supplied)

Section 18 of the Kansas Constitution, Bill of Rights, guarantees: "All persons, for injuries suffered in person, reputation, or property, shall have remedy by due course of law, and justice administered without delay". How then can the Legislature validly deprive a court of its "inherent power" existing independently of statutory authority to grant injunctive relief to prevent irreparable injury? (See 28 Am. Jur. 242, Injunctions, Section 47)

It would be presumptious for appellants to relate the reasons for the inherent power of a court of equity to grant injunctive relief. However, appellants respectfully

submit that the *only* practical way for them to even attempt to protect their rights is to have the remedy of injunction.

The Supreme Court of Kansas, in the case of *Wallace v. Winfield,* 96 Kan. 35, 149 Pac. 693, *holding, that before a city may interfere with water rights, it must make compensation,* recognized the reasons why injunctive relief was necessary—continuous damages necessitating frequent and almost continuous litigation.

A suit for damages, aside from being prohibitive in expense and speculative with respect to damages, in effect, would require appellants to sell their property to any prospective appropriator, even though they did not desire to do so and the appropriator would use such property for a private purpose. (An appropriator may well be a private person.)

Appellants' property can constitutionally be taken from them *only* by the proper exercise of the right of eminent domain, 63 Kan., 484, 488; 65 Pac. 684.

The Court's attention is also called to the fact that *each* landowner affected, would have to file individual claims and prosecute individual actions for damages, thus multiplying in geometric proportions the already prohibitive expense!

Certainly, no court should assume that every natural person, partnership, etc., is, or at any given time will be solvent; on the contrary, experience demonstrates the fallacy of such an assumption.

The Supreme Court of Kansas has recognized that the remedy of injunction is protected by the Federal Constitution. In the case of *Bull v. International Alliance,* 119 Kan. 713, 717; 241 Pac. 459, the Court said:

> "Again, if it were given the broad application contended for prohibiting injunctions in cases like the one under consideration, where defendants conspired to and did injure plaintiff's business and property rights, to the extent that their acts constituted a nuisance to the plaintiff and the public, it would fall within the rule of Truax v. Corrigan, 257 U.S. 312, holding that an *act* which *would make lawful an interference* with an owner's business and *deprive him of property rights,* would *not* be due process or equal protection of the law, and *would be a violation* of the fourteenth amendment of the federal constitution." (Emphasis supplied)

On numerous occasions the United States Supreme Court has recognized constitutional limitations on impairment of rights by means of withdrawal or impairment of a remedy. In the case of *Seibert v. U. S.,* 122 U.S. 284; 30 L. Ed. 1161, 1165, the Court said:

> "It is well settled by the decisions of this court that 'The remedy subsisting in a State, when and where the contract is made and is to be performed, is a part of its obligation, and any subsequent law of the State which so affects that remedy as substantially to impair and lessen the value of the contract is forbidden by the Constitution, and is therefore void.' Edwards v. Kearzey, 96 U.S. 595, 607 (24:793, 798)
>
> It has been previously said upon a review of the decisions of the court, in Von Hoffman v. Quincy, 71 U.S. 4 Wall, 535, 553 (18:403, 409): 'It is com-

petent for the States to change the form of the remedy, or to modify it otherwise as they may see fit, provided no substantial right secured by the contract is thereby impaired. No attempt has been made to fix definitely the line between alterations of the remedy which are to be deemed legitimate and those which, under the form of modifying the remedy, impair substantial rights. Every case must be determined upon its own circumstances. Whenever the result last mentioned is produced the Act is within the prohibition of the Constitution, and to that extent void.'

In Bronson v. Kinzie, 42 U.S. 1 How. 311 (11:143), Chief Justice Taney said: 'It is difficult, perhaps, to draw a line that would be applicable in all cases between legitimate alterations of the remedy and provisions which, in the form of remedy, impair the right. But it is manifest that the obligation of the contract, and the rights of a party under it, may, in effect, be destroyed by denying a remedy altogether; or may be seriously impaired by burdening the proceedings with new conditions and restrictions, so as to make the remedy hardly worth pursuing.'

In Louisiana v. New Orleans, 102 U.S. 203, 206 (26:132, 133), Mr. Justice Field, in the opinion of the court, said: 'The obligation of a contract, in the constitutional sense, is the means provided by law by which it can be enforced—by which the parties can be obliged to perform it. Whatever legislation lessens the efficacy of these means impairs the obligation'."

Without an adequate remedy a vested property right is rendered worthless; by withdrawal of the remedy, the property right is destroyed and, therefore, the Act

which denies the remedy is void. (See *Twining v. New Jersey*, 211 U.S. 77; 53 L. Ed. 97, 107), and cases therein cited.

Constitutional limitations will not permit any legislation which cuts down a property right to a mere right to sue for damages. No man can thus be forced to sell his property to another especially when there is no assurance that the other can or will pay any judgment recovered against him.

The Supreme Court of Kansas, in the case of *Murrison v. Fenstermacher*, 166 Kan. 568; 203 Pac. 2d 160, held the Legislature was without power to divest an owner of his property by cutting down his ownership to a mere right of action which will be lost unless asserted by him in an action brought within a specified time.

Appellants will not dwell upon what is considered fatal defect in the Act, but do not want the Court to overlook a significant and controlling omission. Nowhere in the Act is there any time allowed for an owner to put his "right to use" (which was a vested right as hereinabove demonstrated) to actual use. Even if the law were good otherwise, this omission alone is fatal because no state can thus summarily divest property rights under the Federal Constitution. No statute can thus take water rights any more than it could take an automobile because the owner thereof saw fit to let it remain in the garage!

The District Court held that 82a-712 and 82a-716 provide an "adequate remedy"; however, even a casual

examination of such sections demonstrates their utter and complete inadequacy. 82a-712 provides:

> "An applicant shall be entitled to proceed . . . and shall not be restrained or enjoined from proceeding with the construction of diversion or other authorized work or from the diminution of water supply, by any common-law claimant: *Provided,* That common-law users with determined vested rights as herein defined, may enjoin diversions which impair such uses."

and 82a-716 provides:

> ". . . An appropriator who has acquired a valid right under this statute may prevent, by injunction, a subsequent diversion by a common-law claimant of private rights without being required to first condemn possible private rights."

Nowhere in the Act is there any provision for appellants, or anyone in their position, to appeal from an appropriation permit which might be granted to an applicant; even though such permit would and must inevitably affect them.

The Chief Engineer has made no determination respecting these appellants and until he does so, they have no administrative remedies and no right to effective judicial remedies under the Act. How then can they be said to have "an adequate remedy" or have failed "to exhaust the remedies afforded them by the Act."

These appellants have never been officially notified of *any* orders or decisions by the Chief Engineer. Their only knowledge thereof has been acquired extra-officially which was gained casually.

In addition thereto, these appellants have learned that the Chief Engineer, on May 18, 1954, denied other landowners in the equus beds area vested rights as defined by the Act. In view of such orders, surely appellants would not be required to perform a wholly futile act. One of the common-law maxims is: "The law does not require a futile act."

Furthermore, the Act being unconstitutional then, obviously, neither the appellants nor anyone else need follow any procedure set up under such unconstitutional act but, as such act violates the Federal Constitution, any plaintiff may disregard the law and challenge the constitutionality thereof in a Federal Court of competent jurisdiction.

As Chief Justice Marshall said in the case of *Marbury v. Madison,* 1 Cranch 137, 177, 2 L. Ed. 60, 73:

> "If an act of the legislature, repugnant to the constitution, is void, does it, notwithstanding its invalidity, bind the courts, and oblige them to give it effect? [or bind litigants to follow it?] Or, in other words, though it be not law, does it constitute a rule operative as if it was a law? This would be to overthrow in fact what was established in theory; and would seem, at first view, an absurdity too gross to be insisted on." (Phrase in brackets supplied.)

There being no effective administrative or judicial remedy, the Act is void. See *Pacific Teleph. & Teleg. Co. v. Kuykendall,* 265 U.S. 196; 68 L. Ed. 975, and authorities cites, *supra.*

TITLE OF ACT IS FATALLY DEFECTIVE.

It is also apparent that the Kansas Supreme Court, in the case of *State, ex rel., v. Knapp,* 167 Kan. 546, 555; 207 Pac. 2d 440, 447, *supra,* did not consider the title to the Act in question.

Under Article 2, Section 16 of the Kansas Constitution, the title to an act is of critical importance:

> "No bill shall contain more than one subject, *which shall be clearly expressed* in its title . . . ''' (Emphasis supplied)

In the case of *State v. Shell,* 58 Kan. 507; 49 Pac. 668, the Supreme Court of Kansas said:

> "That the provisions of section 16 of article 2 of the Constitution are mandatory, and that the courts will declare void an act passed in violation of them is firmly fixed in the jurisprudence of this State. Comm'rs of Sedgwick Co. v. Bailey, 13 Kan. 600; Swayze v. Britton, 17 id. 625; Evans v. Adams, 21 id. 119; the State, ex rel., v. Bankers Association, 23 id. 499; Shepherd v. Helmers, 23 id. 504; The State v. Barrett, 27 id. 213; The State v. Lewin, 53 id. 679; The State v. Deets, 54 id. 504; The State v. Guiney, 55 id. 532."

and in the case of *County of Sedgwick v. Bailey,* 13 Kan. 600, Dassler's 2d Ed., 13 Kan. 446, 451, the Court said:

> "It would be a dangerous doctrine to announce that any of the provisions of the constitution may be obeyed or disregarded at the mere will or pleasure of the legislature, unless it is clear, beyond all question, that such was the intention of the framers of the instrument. It would seem to be a lowering of the proper dignity of such an instrument to say

that it descends to prescribing mere rules of order in unessential matters, which may be followed or disregarded at pleasure. Judge Cooley uses the following language: 'The fact is this: that whatever constitutional provision can be looked upon as directory merely, is very likely to be treated by the legislature as if it was devoid even of moral obligation, and to be therefore habitually disregarded. To say that a provision is directory, seems, with many persons, to be equivalent to saying that it is not law at all. That this ought not to be so, must be conceded. That it is so, we have abundant reason and good authority for saying. If, therefore, a constitutional provision is to be enforced at all, it must be treated as mandatory.' Cooley, Const. Lim. 150. Now, whether what Judge Cooley says is true or not, we have no doubt, both upon reason and authority, that the said constitutional provision should be considered as mandatory; and whenever the legislature clearly violates the provision by putting something in the body of an act which is clearly not embraced in the title thereof, or is wholly foreign to the title, the courts should declare such portion of the act void."

Let us proceed to examine the title to the Water Appropriation Act of 1945 (Chapter 390, Laws 1945); it provides as follows:

> "An Act to conserve, protect, control and regulate the use, development, diversion and appropriation of water for beneficial and public purposes, and to prevent waste and unreasonable use of water, . . . "

Appellants respectfully submit that a title which recites "conserve, protect, control and regulate" does not even remotely express any hint or suggestion of *ex-*

propriation. Much less, that the content of the Act will do away with thoroughly established property rights. Such an Act under such a title is void for violating both the State and Federal Constitutions.

The South Dakota Supreme Court, in commenting upon the title of the South Dakota Act under consideration in the case of *St. Germain Irrig. Co. v. Hawthorn Ditch Co.*, 32 S. D. 260, 143 N.W. 124, said:

> "The title is 'An act prescribing regulations for the appropriation and distribution and use of water for irrigation, mining, water power and other beneficial uses.' The subject of this title is purely regulatory and will not carry legislation confiscatory of vested property rights; nor legislation establishing new rules of evidence or of pleading; nor legislation tending to interfere with the constitutional jurisdiction and powers of the courts."

The similarity in the titles of the Kansas Act and the South Dakota Act is apparent and it is equally clear that the infirmities in the title of the South Dakota Act inhere in and invalidate the Kansas Water Act because the Kansas Water Act attempts to do the opposite of the purposes expressed in the title, and accomplishes other objects, not even remotely suggested or hinted in or by the title.

CONCLUSION.

In any event the District Court's dismissal of appellants' Complaint is erroneous because the findings of fact made required the Court to grant appellants an injunction to restrain further damage to appellants by continued withdrawal of water from their lands.

The District Court specifically found:

> "By reason of the operations of the City, *pursuant to said permits and orders of defendant,* plaintiff's lands have been affected to a considerable extent and *will continue to be more seriously affected* if said City is permitted to continue to withdraw water from under plaintiffs' lands. . . . " (Emphasis supplied)
>
> "Plaintiffs' land is located in the City's proposed and pending well-field application for 25,000 additional acre feet of water per year."
>
> "Such beds provide natural sub-irrigation for plaintiffs' lands and plaintiffs have been and are using Equus Beds water for domestic purposes."

Appellants respectfully submit that such findings not only permitted but actually *required* the District Court to grant them affirmative relief.

Appellants respectfully submit that the Water Appropriation Act of 1945 not only does violence to fundamental concepts, but also is wholly unconstitutional, unfair, unrealistic, conducive to waste rather than conservation, and should be declared void *in toto.*

If the principles embodied in such Act can stand, then no property and no rights will ever be safe from expropriation. If water and vested rights in water can thus be destroyed, then the use of soil or *any property* can likewise be destroyed and given away on a "first-come, first-served" basis.

If the Act is held unconstitutional, then appellants are certain that the Legislature of Kansas will undoubtedly promptly enact a true water conservation law which will

not permit, nor result in, confiscation of vested, property rights, unnecessary, unreasonable waste, or use, of water, but which will *require development and not destruction* of the water resources of the State of Kansas.

Respectfully submitted,

KENNETH G. SPEIR,
HERBERT H. SIZEMORE,
Both of Newton, Kansas,
Counsel for Appellants.

APPENDIX A

APPENDIX A

APPENDIX A.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

CIVIL ACTION
No. T-1228
ENTERED
APR 30 1956
HARRY M. WASHINGTON, Clerk
By /S/ Elizabeth C. Rion
Deputy

J. H. BAUMANN and MARGUERITE MARIE JACOBSON, PLAINTIFFS.

v.

ROBERT V. SMRHA, as Chief Engineer of the Division of Water Resources of the Kansas State Board of Agriculture, DEFENDANT,

and

CITY OF WICHITA, KANSAS, INTERVENER.

Kenneth G. Speir, Vernon A. Stroberg, Herbert H. Sizemore, and Richard F. Hrdlicka, for plaintiffs.

Harold R. Fatzer, Atty. Gen., for the State of Kansas, Paul E. Wilson, Asst. Atty. Gen., and Warden L. Noe, Spec. Asst. Atty. Gen., for defendant.

Fred W. Aley, Robert B. Morton, and Paul J. Donaldson, for intervener, City of Wichita, Kansas.

Daniel R. Hopkins, Attorney for Finney County Water Users Association, a Corporation; South Side Irrigation Company, a corporation; The Kearny County Farmers Irrigation Association, a corporation; The Garden City Ditch Company, a corporation; the United States Irrigating Company, a corporation, and Earl C. Bookover, filed a brief amicus curiae.

Arno Windscheffel, Attorney for the Kirwin Irrigation District, and N. J. Ward, Attorney for the Kansas Bostwick Irrigation District, filed a brief amicus curiae.

Before HUXMAN and PHILLIPS, Circuit Judges, and MELOTT, District Judge.

PHILLIPS, Circuit Judge.

This action was instituted on August 16, 1955, in the above court, by J. H. Baumann and Marguerite Marie Jacobson, plaintiffs, under the provisions of 28 USC §§ 1331, 2201, 2281, and 2284, against Robert V. Smrha, defendant, Chief Engineer of the Division of Water Resources of the Kansas State Board of Agriculture. This action arises under the Fourteenth Amendment to the Constitution of the United States.

The action was brought for the purpose of obtaining a declaratory judgment that the Kansas Water Appropriation Act of 1945 (G. S. 1949, Ch. 82a, Art. 7), hereinafter referred to as the Act, violates the Fourteenth Amendment to the Constitution of the United States, and is, therefore, null and void; for an injunction restraining the defendant from enforcing, operating under, or executing said Act; and requiring defendant to revoke and nullify any and all permits, vested right orders, or other actions and decisions heretofore taken or entered by him under or pursuant to said Act. On September 9, 1955, an order was entered in the case, constituting a three-judge court. On September 10, 1955, the defendant filed a motion to quash the summons and dismiss the action on the grounds: (1) the court does not have jurisdiction of the defendant; (2) that the court does not have jurisdiction of the subject matter of the action; and (3) that the complaint does not state a cause of action. On October 13, 1955, the City of Wichita, Kansas, hereinafter referred to as the City, with the leave of court, intervened in the action and filed an answer. Pursuant to an

order entered in September 26, 1955, a hearing was had before the three-judge court on October 21, 1955. At this hearing it was agreed that the court would not attempt to adjudicate any liability of the City to the plaintiffs. Certain irrigation districts and Earl C. Brookover were granted leave to file briefs as "friends of the Court" in support of the defendant's position that the statute is valid. The Committee of Kansas Farm Organizations was also granted leave to file a brief as a "friend of the Court" in support of plaintiffs' contention. Certain facts were stipulated and certain exhibits were introduced in evidence. The parties then agreed in open court that there no longer remained any controverted issue of fact and both plaintiffs and defendant orally moved for summary judgment.

The motions for summary judgment were orally argued. Written briefs have been filed and the motions now stand submitted.

The Material facts are as follows:

The plaintiff, J. H. Baumann, is the life tenant, and the plaintiff, Marguerite Marie Jacobson, is the remainder owner of the fee title to certain lands situated in Harvey County, Kansas, on the south boundary line of said county, three miles west and two miles north of the Town of Bentley; to wit, the southwest quarter of Section 32, Township 24 South, Range 2 West of the Sixth Principal Meridian. The title to such lands, now owned by plaintiffs, passed from the United States into private ownership during the year 1880 and the plaintiff, Baumann, acquired it in 1930.

Such lands are located in what is known as the "Equus Beds," a geological formation containing water of a quantity suitable for domestic, municipal, irrigation, and other purposes. The Equus Beds is a ground water reservoir composed of extremely permeable gravel and sand, occupying the channel of an ancestral Smoky Hill River, which flowed into an ancestral Arkansas River. Such

Beds cover an area extending approximately 55 miles north and south between Wichita and Lindsborg and approximately 25 miles east and west and located principally in the Counties of Sedgwick, Harvey and McPherson, in the State of Kansas. The ground water within the reservoir moves generally toward the Little Arkansas River, except in the northern part, where there is a movement toward the Smoky Hill River. There has been and now is a "draw-down" of the water table under plaintiffs' lands. Such Beds provide natural sub-irrigation for plaintiffs' lands and plaintiffs have been and are using Equus Beds water for domestic purposes.

It has been estimated on the basis of test drilling that the part of this ground water reservoir between the Towns of McPherson and Valley Center contained millions of acre feet of water in storage under natural conditions. This ground water is recharged chiefly by direct precipitation. Detailed studies made from 1938 to 1944 showed that most of the natural discharge from the ground water reservoir occurred by evapotranspiration in areas where the depth of water was less than 20 feet.

In 1940, the City acquired by purchase for municipal water supply 25 five-acre well sites in Harvey County, located three to ten miles east and northeast of plaintiffs' lands and thereafter the City purchased other well sites. Thereafter, the City drilled and equipped water wells thereon and commenced pumping water therefrom for use by the inhabitants of the City and its environs. The water levels of the Equus Beds have declined since the City drilled wells in 1940 and the water table might have declined as much as four feet without pumping, because of drought, but the rest of the decline must be attributed to pumping, chiefly by the City.

At present there are more than 200 water wells in addition to the City's wells that are located in the general area of plaintiffs' lands, at least 14 being located nearer to plaintiffs' lands than any of the City's wells. Since 1945, the operations of the City and others, pur-

suant to certain permits and orders issued by the defendant, have withdrawn and are withdrawing water from the Equus Beds.

The defendant is the duly appointed, qualified and acting Chief Engineer of the Division of Water Resources of the Kansas State Board of Agriculture, and is the official charged with certain duties and authorities in connection with the administration of the Act.

By reason of the operations of the City, pursuant to said permits and orders of defendant, plaintiffs' lands have been affected to a considerable extent and will continue to be more seriously affected if said City is permitted to continue to withdraw water from under plaintiffs' lands. From January, 1952, to October 1, 1954, the water table under plaintiffs' lands declined approximately four feet. From October 1, 1954, to July 1, 1955, the water table level under plaintiffs' lands and other lands in the same general area remained almost constant. The water table under all lands in the same general area similarly declined.

The Kansas legislature has taken cognizance of apparent damages to landowners by reason of granting permits for appropriating water for beneficial use and of questions of the constitutionality of the Act, arising because of inadequate provisions as to notice to and for compensation of landowners and persons owning vested water rights. The Kansas Legislative Council reported that procedural aspects of the Act needed correction to insure notice and hearing.

The people who depend upon the Equus Beds for water have the immediate problems which accompany increasing use of any reservoir—water holes have gone dry, shallow wells have been deepened, many wells now obtain water of poorer quality, and some crops have undoubtedly been reduced in area where the water table was once near enough to the surface to be reached by the plants.

At the end of 1951, the water table was higher throughout the well-field area than at the end of 1954, and at the end of that wet year, it was significantly lower than in 1940, throughout an area of 45 square miles, and the decline exceeded 10 feet in an area of 11 square miles, and in certain locations 20 feet. This area of depression had been expanding and deepening ever since pumping began in 1940, partly because of the progressive increase in pumpage from 1940 to 1951.

Plaintiffs' land is located in the City's proposed and pending well-field application for 25,000 additional acre feet of water per year.

It is alleged in the complaint that the matter in controversy exceeds the sum or value of $3,000, exclusive of interest and costs. On motion for summary judgment, that allegation stands admitted,[1] and it does not affirmatively appear from the complaint that the value of the right which the plaintiffs seek to protect does not exceed $3,000, exclusive of interest and costs.

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[1]Safeway Stores v. Wilcox, 10 Cir., 220 F. 2d 661;
Harris v. Railway Express Agency, 10 Cir., 178 F. 2d. 8;
Furton v. City of Menasha, 7 Cir., 149 F. 2d 945, c. d. 326 U. S. 771.

The Act, in part, reads as follows:

"82a-701. Definitions. When used in this act the following words shall have the following respective meanings:

"(a) 'Person' shall mean and include a natural person, a partnership, an organization, a corporation, a municipality and any agency of the federal government.

"(b) 'Chief engineer' means the chief engineer of the division of water resources of the Kansas state board of agriculture.

"(c) 'Domestic uses' means the use of water for household purposes, the watering of livestock, poultry, farm and domestic animals and the irrigation of gardens and lawns.

"(d) 'Vested right' means the right to continue the use of water having actually been applied to any beneficial use at the time of the passage of this act or within three years prior thereto to the extent of the existing beneficial use made thereof, and shall include the right to take and use water for beneficial purposes where a person is engaged in the construction of works for the actual application of water to a beneficial use at the time of the passage of this act, provided such works shall be completed and water is actually applied for such use within a reasonable time thereafter.

"(e) 'Appropriator' means and includes a person who obtains a permit from the chief engineer authorizing him to divert and apply an allotted quantity of water for a designated beneficial use and who makes actual use of the water for such purpose.

"(f) 'Appropriation' means and includes an amount of water authorized and allotted by the chief engineer for a designated beneficial purpose within specific limits as to quantity and rate of diversion and withdrawal.

"82a-702. Dedication of use of water. All water within the state of Kansas is hereby dedicated to the use of the people of the state, subject to the control and regulation of the state in the manner herein prescribed.

"82a-703. Water may be appropriated subject to vested rights. Subject to vested rights, all waters within the state may be appropriated for beneficial use as herein provided. Nothing in this act contained shall impair the vested right of any person except for nonuse.

"82a-704. Order establishing rights of persons making beneficial use of waters as of June 28, 1945; notice; time for appeals to district court. As soon as practicable after the passage of this act, the chief engineer or his authorized representatives shall proceed with the necessary steps to gather data and other information as may be essential to the proper understanding and determination of the vested rights of all parties using water for beneficial purposes other than domestic. Such observations and measurements shall be reduced to writing and made a matter of record in his office.

"The chief engineer shall then make an order determining and establishing the rights of all persons making beneficial use of water on the effective date of this act and the then extent of their uses and shall notify all such work [water] users as to the contents of such order. Service of such notice shall be deemed complete upon depositing such notice in the post office as registered mail addressed to such water user at his last known post-office address. The order of determination of the chief engineer shall be in full force and effect from the date of its entry in the records of his office unless and until its operation shall be stayed by an appeal therefrom by such user to the district court of the county in which the point of diversion of such use is located. All such appeals from the order of the chief engineer must be filed within sixty days after posting and mailing of the notice of such order of determination.

"81a-705. Permit to acquire an appropriation right to water. No person shall have the power or authority to acquire an appropriation right to water without first obtaining the approval of the chief engineer: *Provided, however,* That this section shall not apply to persons using water for domestic uses.

"82a-706. Duties of chief engineer as to rights of priority of appropriation. The chief engineer is

hereby authorized and empowered, and it is hereby made the duty of such officer, to control, conserve, regulate and allot the water resources of the state for the benefits and beneficial uses of all of its inhabitants in accordance with the rights of priority of appropriation.

"82a-707. Principles governing appropriations (a) Surface or ground waters of the state may be appropriated as herein provided. Such appropriation shall not constitute absolute ownership of such water, but shall remain subject to the principle of beneficial use. (b) Where appropriations of water for different purposes conflict they shall take precedence in the following order, namely: Domestic, municipal, irrigation, industrial, recreational and water power uses. (c) As between appropriators, the first in time is the first in right. The priority of the appropriation shall date from the time of the filing of the application therefor in the office of the chief engineer. (d) Appropriation in excess of the reasonable needs of the appropriator shall not be allowed.

"82a-708. Determination of priorities of right of applicants for permits; appeals. The chief engineer shall determine the priorities of right to the use of the waters of the state, as to all persons who have since May 5, 1941, and who shall hereafter make application for a permit or certificate to divert, appropriate and use water. An appeal may be taken from any decision or order of the chief engineer to the district court in the county of his official residence or in the county in which the point of diversion is located. All such appeals must be filed within thirty days after date of such decision or order."

Section 82a-709 provides that every person intending to acquire an appropriation right to any of the waters of the State for beneficial use, other than domestic, may do so by making an application to the Chief Engineer for

a permit to make such appropriation. It enumerates what shall be set forth in the application.

Section 82a-710 provides that upon the receipt of the application, the Chief Engineer shall endorse thereon the date and assign a number thereto.

Section 82a-711 provides that it shall be the duty of the Chief Engineer to approve all applications made in proper form which contemplate the utilization of water for beneficial purposes, provided the proposed use does not conflict with an existing use, and provided the proposed use does not prejudicially and unreasonably affect the public interest. It does not provide for any notice to third persons whose rights may be adversely affected by the appropriation of water by the permittee.

Section 82a-716 provides:

> "Common law claimants; action for compensation; injunctions by appropriators. If any appropriation, or the construction and operation of authorized diversion works results in an injury to any common-law claimant, such person shall be entitled to due compensation in a suitable action at law against the appropriator for damages proved for any property taken. An appropriator who has acquired a valid right under this statute may prevent, by injunction, a subsequent diversion by a common-law claimant of private rights without being required to first condemn possible private rights. An appropriator shall have right to injunction relief to protect his prior right of beneficial use as against use by an appropriator with a later priority of right."

Section 82a-717 provides:

> "Beneficial purpose; termination for non-use. All appropriations of water must be for some beneficial purpose. The right of the appropriator and his successors to the use of water shall terminate when he ceases for three years or more, to use it for the ben-

eficial purposes authorized in his permit or certificate."

Whether this is an action against the State depends upon whether the challenged Act is constitutional. If it is unconstitutional, the Chief Engineer is acting as an individual and not as an agent or instrumentality of the State.

In the recent case of Georgia Railroad & Banking Co. v. Redwine, 342 U. S. 299, 304, 305, 306, the court said:

> "This Court had long held that a suit to restrain unconstitutional action threatened by an individual who is a state officer is not a suit against the State.
>
> • • • • •
>
> "Since appellant seeks to enjoin appellee from a threatened and allegedly unconstitutional invasion of its property, we hold that this action against appellee as an individual is not barred as an unconsented suit against the State. The State is free to carry out its functions without judicial interference directed at the sovereign or its agents, but this immunity from federal jurisdiction does not extend to individuals who act as officers without constitutional authority.
>
> "Accordingly, we find that the District Court was not deprived of jurisdiction in this case on either the ground that it is a suit against the State • • •."

Prior to the enactment of the Act, the Supreme Court of Kansas in many decisions had recognized the applicability in Kansas of the doctrine of riparian rights. In State ex rel. v. Kansas State Board of Agriculture, 158 Kan. 603, 149 P. 2d 604, at page 608, the court said:

> "Under the above authorities underground waters are a part of the real property in which they are situated. The owner of land may convey or grant the underground water, or the right to take it from the land, by an appropriate instrument in writing to the

same extent that he might convey or grant any other portion of the real property; or a party, having the right of eminent domain, may appropriate underground water to his use by condemnation proceedings."

However, in the subsequent case of State v. Knapp, 167 Kan. 546, 207 P. 2d 440, at page 447, the court, in construing the Act here in question, in part, said:

"We next observe that no complaint is made of Section 702, which declares: 'All water within the state of Kansas is hereby dedicated to the use of the people of the state, subject to the control and regulation of the state in the manner herein prescribed.'

"This is the heart of the statute. The rest of it treats of details and procedure. It forms the basis for a different approach to the solution of questions concerning water rights than we have had in some of our opinions. Heretofore we have approached the questions largely on the basis of individual interest alone. Under this declaration and other provisions of the act we now approach them upon the basis of the interest of the people of the state without losing sight of the beneficial use the individual is making or has the right to make of the water. Unused or unusable rights predicated alone upon theory become of little if any importance. Broad statements found in some of our opinions, such as 'Every man through whose land a stream of water runs is entitled to the flow of that stream without diminution or alteration' Shamleffer v. Council Grove Peerless Mill Company, 18 Kan. 24, must be disregarded or modified to harmonize with this declaration. The change is an appropriate one for the legislature to make. Individuals do not live alone in isolated areas where they, at their will, can assert all of their individual rights without regard to the effect upon others."

It should be observed that the Act recognizes and affords protection to vested rights. Section 82a-704 provides for the determination of such rights by the Chief Engineer and for a review of his action by appeal to the appropriate state district court. Section 82a-708 provides for the determination of priorities of rights of applicants for permits by the Chief Engineer and for a review of his determinations by appeal to the appropriate state district court.

It is true that the Act does not provide for notice to persons, who may be adversely affected by the granting of a permit, of the hearing or of the action by the Chief Engineer upon applications for permits. However, permits are necessarily granted subject to valid existing vested rights and to prior appropriations, and provision for the protection of those rights, either by actions for damages or for injunction, is carefully made by Sections 82a-712 and 82a-716.

The power of a state either to modify or reject the doctrine of riparian rights because unsuited to the conditions in the state and to put into force the doctrine of prior appropriation and application to beneficial use or of reasonable use has long been settled by the adjudicated cases.[2]

See, also,
Bassett v. Salisbury Mfg. Co., 43 N. H. 569;
Meeker v. East Orange, 77 N.J.L. 623, 74 A. 379;
Erickson v. Cookston Waterworks, Power & Light Co., 100 Minn. 481, 111 N.W. 391.

Of course, such a modification in the law of the state must recognize valid existing vested rights, but we do not regard a landowner as having a vested right in underground waters underlying his land which he has not appropriated and applied to beneficial use.[3]

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[2]Katz v. Walkinshaw, 141 Cal. 116, 74 P. 766;
[3]Katz v. Walkinshaw, 141 Cal. 116, 74 P. 766, 771.
Murphy v. Kerr, D.C.N.M., 296 F. 536.

We hold that the state could properly apply the doctrine of prior appropriation and application to beneficial use to unused and unappropriated waters so long as it recognized and afforded protection to rights which landowners had acquired at the time of the effective date of the Act to appropriate and use water.

Whether such a change in the law of Kansas is contrary to earlier decisions of the Supreme Court of Kansas, it is cognizant with the latest decision of the Supreme Court of Kansas in State v. Knapp, 167 Kan. 546, 207 P. 2d 440, which must be regarded as having overruled the earlier cases.

There is no vested right in the decisions of a court and a change of decision does not deprive one of equal protection of the laws or property without due process of law.[4]

Even though prior decisions of a state court have established a rule of property, a departure therefrom in a subsequent decision does not, without more, constitute a deprivation of property without due process of law under the Fourteenth Amendment.[5]

The Fourteenth Amendment in guaranteeing equal protection of the laws does not assure uniformity of judicial decisions or immunity from judicial error.[6] Likewise, it is well settled that a legislature may change the

[4]Sunray Oil Co. v. Commissioner, 10 Cir., 147 F. 2d 962, 963, c. d. 325 U. S. 861;
Cooper v. Commissioner, 4 Cir., 197 F. 2d 951, 953;
Carolina-Virginia Racing Ass'n v. Cahoon, 4 Cir., 214 F. 2d 830, 832.

[5]O'Neil v. Northern Colorado Irrigation Co., 242 U. S. 20, 26, 27.

[6]Milwaukee Elec. Ry. Co. v. Milwaukee, 252 U. S. 100, 106; 64 L. Ed. 480.
Riley v. Worcester County Trust Co., 1 Cir., 89 F. 2d 59, 66, affirmed 302 U. S. 292.

principle of the common law and abrogate decisions made thereunder when in the opinion of the legislature it is necessary in the public welfare.[7]

Adequate water supply is a necessity. In the arid and semi-arid regions of the West it is imperative that all available water be utilized beneficially and without waste. The accomplishment of those ends is well within the competency of the legislature.

Plaintiffs have not seen fit to invoke the remedies afforded them by the Act. Those remedies are adequate, we think, to afford protection to any vested rights of the plaintiffs.

We conclude that the Act is constitutional.

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[7]United States v. United Shoe Mfg. Co., 8 Cir., 264 F. 138, 151, appeal dismissed 254 U. S. 666, affirmed 258 U. S. 451, rehearing denied 259 U. S. 575;
Silver v. Silver, 280 U. S. 117;
Shea v. Olson, 185 Wash. 143, 53 P. 2d 615;
Pringle v. Gibson, 135 Me. 297, 195 A. 695, rehearing denied 135 Me. 512, 197 A. 553;
Komorowski v. Boston Store of Chicago, 341 Ill. 126, 173 N.E. 189.

FINDINGS OF FACT

The court hereby finds the facts set out on pages 4 to 9, inclusive, of the opinion herein, which are hereby incorporated herein by reference.

WALTER A. HUXMAN
Circuit Judge

ORIE L. PHILLIPS
Circuit Judge

ARTHUR J. MELLOTT
Chief District Judge

APPENDIX B

APPENDIX B

APPENDIX B.

General Statutes of Kansas, 1949:

The Water Appropriation Act.

82a-701. Definitions. When used in this act the following words shall have the following respective meanings:

(a) "Person" shall mean and include a natural person, a partnership, an organization, a corporation, a municipality and any agency of the federal government.

(b) "Chief engineer" means the chief engineer of the division of water resources of the Kansas state board of agriculture.

(c) "Domestic uses" means the use of water for household purposes, the watering of livestock, poultry, farm and domestic animals and the irrigation of gardens and lawns.

(d) "Vested right" means the right to continue the use of water having actually been applied to any beneficial use at the time of the passage of this act or within three years prior thereto to the extent of the existing beneficial use made thereof, and shall include the right to take and use water for beneficial purposes where a person is engaged in the construction of works for the actual application of water to a beneficial use at the time of the passage of this act, provided such works shall be completed and water is actually applied for such use within a reasonable time thereafter.

(e) "Appropriator" means and includes a person who obtains a permit from the chief engineer authorizing him to divert and apply an allotted quantity of water for a designated beneficial use and who makes actual use of the water for such purpose.

(f) "Appropriation" means and includes an amount of water authorized and allotted by the chief engineer

for a designated beneficial purpose within specific limits as to quantity and rate of diversion and withdrawal. (L. 1945, ch. 390, sec. 1; June 28)

82a-702. Dedication of use of water. All water within the state of Kansas is hereby dedicated to the use of the people of the state, subject to the control and regulation of the state in the manner herein prescribed. (L. 1945, ch. 390, sec. 2; June 28)

82a-703. Water may be appropriated subject to vested rights. Subject to vested rights, all waters within the state may be appropriated for beneficial use as herein provided. Nothing in this act contained shall impair the vested right of any person except for nonuse. (L. 1945, ch. 390, sec. 3; June 28)

82a-704. Order establishing rights of persons making beneficial use of waters as of June 28, 1945; notice; time for appeals to district court. As soon as practicable after the passage of this act, the chief engineer or his authorized representatives shall proceed with the necessary steps to gather data and other information as may be essential to the proper understanding and determination of the vested rights of all parties using water for beneficial purposes other than domestic. Such observations and measurements shall be reduced to writing and made a matter of record in his office.

The chief engineer shall then make an order determining and establishing the rights of all persons making beneficial use of water on the effective date of this act and the then extent of their uses and shall notify all such water users as to the contents of such order. Service of such notice shall be deemed complete upon depositing such notice in the post office as registered mail addressed to such water user at his last known post-office address. The order of determination of the chief engineer shall be in full force and effect from the date

of its entry in the records of his office unless and until its operation shall be stayed by an appeal therefrom by such user to the district court of the county in which the point of diversion of such use is located. All such appeals from the order of the chief engineer must be filed within sixty days after posting and mailing of the notice of such order of determination. (L. 1945, ch. 390, sec. 4; June 28)

82a-705. Permit to acquire an appropriation right to water. No person shall have the power or authority to acquire an appropriation right to water without first obtaining the approval of the chief engineer: *Provided, however,* That this section shall not apply to persons using water for domestic uses. (L. 1945, ch. 390, sec. 5; June 28)

82a-706. Duties of chief engineer as to rights of priority of appropriation. The chief engineer is hereby authorized and empowered, and it is hereby made the duty of such officer, to control, conserve, regulate and allot the water resources of the state for the benefits and beneficial uses of all of its inhabitants in accordance with the rights of priority of appropriation. (L. 1945, ch. 390, sec. 6; June 28)

82a-707. Principles governing appropriations. (a) Surface or ground waters of the state may be appropriated as herein provided. Such appropriation shall not constitute absolute ownership of such water, but shall remain subject to the principle of beneficial use. (b) Where appropriations of water for different purposes conflict they shall take precedence in the following order, namely: Domestic, municipal, irrigation, industrial, recreational and water power uses. (c) As between appropriators, the first in time is the first in right. The priority of the appropriation shall date from the time of the filing of the application therefor in the office of the chief engineer. (d) Appropriation in excess of the rea-

sonable needs of the appropriators shall not be allowed. (G. S. 1935, sec. 24-903; L. 1945, ch. 390, sec. 7; June 28)

82a-708. Determination of priorities of right of applicants for permits; appeals. The chief engineer shall determine the priorities of right to the use of the waters of the state, as to all persons who have since May 5, 1941, and who shall hereafter make application for a permit or certificate to divert, appropriate and use water. An appeal may be taken from any decision or order of the chief engineer to the district court in the county of his official residence or in the county in which the point of diversion is located. All such appeals must be filed within thirty days after date of such decision or order. (L. 1945, ch. 390, sec. 8; June 28)

82a-709. Applications for permits; contents. Every person intending to acquire an appropriation right to any of the waters of the state for beneficial use other than domestic may do so only by making an application to the chief engineer for a permit to make such appropriation. The application shall set forth (a) the name and post-office address of the applicant, (b) the source from which said appropriation shall be made, (c) the amount of water sought, (d) the location of the proposed works for the diversion and use of the water, (e) the estimated time for the completion of the works, (f) the estimated time for the first actual application of the water for the beneficial use proposed, (g) if for irrigation use, a description of the land to be irrigated by designating the number of irrigable acres in each forty-acre tract or fractional portion thereof, (h) if for municipal water supply, it shall give the present population to be served and estimated future requirements of the city; (i) any additional factors which may be required by the chief engineer.

Such application may be filed before commencing the construction, enlargement or extension of any works for

the diversion and use of water and before or after performing any work in connection with the same. (L. 1945, ch. 390, sec. 9; June 28)

82a-710. Same; return for correction or completion; maps, plats, plans, and drawings; default in refiling. Upon receipt of the application it shall be the duty of the chief engineer to endorse thereon the date of its receipt and assign a number to the same. If upon examination the application is found to be defective, inadequate or insufficient to enable such official to determine the nature and amount of the proposed appropriation, it shall be returned for correction or completion or for other required information. No application shall lose its priority of filing on account of such defects, provided acceptable data, proofs, maps, plats, plans and drawings are filed in the office of the chief engineer within thirty days following the date of the posting of the return of such application or such further time not exceeding one year as may be given by the chief engineer.

All maps, plats, plans and drawings shall conform to prescribed uniform standard as to materials, size, coloring and scale, and shall show: (a) The source from which the proposed appropriation is to be taken, (b) all proposed dams, dikes, reservoirs, canals, pipe lines, power houses and other structures for the purpose of storing, conveying or using water for the purpose approved and their positions or courses in connection with the boundary lines and corners of the lands which they occupy. Land listed for irrigation shall be shown in government subdivisions or fractions thereof. Default in the refiling of any application within the time limit specified shall constitute a forfeiture of priority date and the dismissal of the application. (L. 1945, ch. 390, sec. 10; June 28)

82a-711. Same; duties of chief engineer. It shall be the duty of the chief engineer to approve all applications made in proper form which contemplate the utiliza-

tion of water for beneficial purpose, within reasonable limitations, provided the proposed use does not conflict with an existing use, and provided the proposed use does not prejudicially and unreasonably affect the public interest. If it is determined that the proposed use of the water sought to be appropriated would impair vested rights, prior appropriations or be detrimental to the public interest, it shall be the duty of the chief engineer to enter an order rejecting such application or requiring its modification to conform to the public interest to the end that the highest public benefit and maximum economical development may result from the use of such water. (L. 1945, ch. 390, sec. 11; June 28)

82a-712. Same; notice of approval or disapproval; injunctions. Upon approval of the application the chief engineer shall notify the applicant to that effect and authorize him to proceed with the construction of the proposed diversion works and to take all steps required to apply the water to the approved and proposed beneficial use and otherwise perfect his proposed appropriation. An application may be approved for a less amount of water than that requested and it may be approved upon terms, conditions and limitations deemed necessary for the protection of the public interest. An applicant shall be entitled to proceed with construction of diversion works and with the diversion and use of water in accordance with the approval and limitations prescribed by the chief engineer and shall not be restrained or enjoined from proceeding with the construction of diversion or other authorized work or from the diminution of water supply, by any common-law claimant; *Provided,* That common-law users with determined vested rights as herein defined, may enjoin diversions which impair such uses.

If the application is refused, the chief engineer shall so notify the applicant, and it shall be unlawful for such applicant to take any steps toward the construction

of the proposed diversion works or to divert or use any such water, so long as the refusal shall continue in force, if such proposed diversion or use affects an appropriation right. Any person who proceeds subsequent to the effective date of this act, to contruct and maintain diversion works without the approval of the chief engineer being first obtained, or who initiates a diversion or use of water from any source for any purpose other than domestic, without such approval, or who proceeds other than as authorized by the approval of his application may be enjoined in any court of competent jurisdiction, when an appropriation right is being affected. (L. 1945, ch. 390, sec. 12; June 28)

82a-713. Same; limiting time for perfection of appropriation; extensions. The chief engineer shall limit the time for the perfecting of an appropriation to a reasonable period within which the proposed works can be completed by expeditious procedure, and he shall for good cause shown by the applicant allow an extension of time. (L. 1945, ch. 390, sec. 13; June 28)

82a-714. Same; notice of completion of works; inspection; issuance of certificate of permit; recordation. Upon the completion of the construction of the works and the actual application of water to the proposed beneficial use within the time allowed, the applicant shall notify the chief engineer to that effect. The chief engineer or his duly authorized representative shall then examine and inspect the appropriation diversion works and, if it is determined that the appropriation diversion works have been completed and the appropriation right perfected, in conformity with the approved application and plans, the chief engineer shall issue a permit or certificate of appropriation in duplicate. The original of such certificate or permit shall be sent to the applicant and shall be recorded with the register of deeds in the county or counties wherein the point of diversion

is located as other instruments affecting real estate, and the duplicate shall be made a matter of record in the office of the chief engineer. (L. 1945, ch. 390, sec. 14; June 28)

82a-715. Same; validation of certain applications. All applications for the appropriation of water to beneficial use as filed with the chief engineer, subsequent to May 5, 1941, and all processing, proceedings and certificates pertaining thereto are validated to same extent as if filed after the effective date of this act, but with priorities as of the dates of filing of applications. All subsequent processing of such applications as are still pending and undetermined shall be further considered and processed as provided in this act. (L. 1945, chc. 390, sec. 15; June 28)

82a-716. Common law claimants; action for compensation; injunctions by appropriators. If any appropriation, or the construction and operation of authorized diversion works results in an injury to any common-law claimant, such person shall be entitled to due compensation in a suitable action at law against the appropriator for damages proved for any property taken. An appropriator who has acquired a valid right under this statute may prevent, by injunction, a subsequent diversion by a common-law claimant of private rights without being required to first condemn possible private rights. An aprpopriator shall have right to injunction relief to protect his prior right of beneficial use as against use by an appropriator with a later priority of right. (L. 1945, ch. 390, sec. 16; June 28)

82a-717. Beneficial purpose; termination for nonuse. All appropriations of water must be for some beneficial purpose. The right of the appropriator and his successors to the use of water shall terminate when he ceases for three years or more, to use it for the beneficial purposes authorized in his permit or certificate. (L. 1945, ch. 390, sec. 17; June 28)

42-308. User; forfeiture. Any right of appropriation shall exist and continue only by the exercise thereof in a lawful manner. The failure of the appropriator continuously to apply such water to lawful and beneficial uses, for a period of three years, without due and sufficient cause shown for such failure, shall constitute a forfeiture and surrender of such right. (G. S. 1935, sec. 42-308; L. 1945, ch. 390, sec. 18; June 28)

82a-718. Forfeiture procedure; appeals. The chief engineer shall compile information concerning the condition, location and extent of every water use and water appropriation other than domestic uses. Before any water appropriation shall be declared forfeited and surrendered the appropriator shall be notified in writing to appear at a designated time and place and show cause why his water appropriation should not be declared forfeited.

Such notice shall contain the following information in addition to the time and place of hearing: (1) A description of the water appropriation in question, giving its number and date of priority; (2) the substantial location of the point of diversion; (3) the general description of the lands or places where such appropriated waters were used; (4) a statement that unless due and sufficient cause be shown the water appropriation will be forfeited and canceled. Such notice may be served by registered mail and shall be posted at least thirty days before the date of the hearing and shall be sent to the last known address of the appropriator or his successor.

The verified report of the chief engineer or his authorized representative shall be prima facie evidence of the forfeiture and surrender of any water appropriation. An appeal may be taken within sixty days from the date of any decision of the chief engineer declaring the forfeiture and cancellation of any water appropriation to the district court of the county in which the

point of diversion for such appropriation is located. (L. 1945, ch. 390, sec. 19; June 28)

82a-719. Distribution of water according to decree of court. Whenever the rights for the use of waters of the state shall have been adjudicated by any court, the division of water resources with the aid of its chief engineer and other officers and employees, shall aid in the distribution of such water according to such decree and shall distribute the water among the several ditches or water users pursuant to the decree; and shall have the power to open, close or adjust the headgates and regulate the controlling works of any ditch or structure, or cause the same to be opened, closed, adjusted and regulated so as to make a distribution of the water in conformity with the decree. (G. S. 1935, sec. 74-509c; L. 1945, ch. 390, sec. 20; June 28)

82a-720. Same; certified copies of decrees. The clerk of any court of this state in which a decree shall be made fixing the rights pertaining to ditches or water users to water, shall within ten days after such decree shall have been entered, forward to the chief engineer of the division of water resources, by registered mail, a certified copy of such decree. (G. S. 1935, sec. 74-509e; L. 1945, ch. 390, sec. 21; June 28)

74-510. Information and assistance to chief engineer. It is hereby made the duty of all departments of the state government and of the state university and state agricultural college and its branches and experiment stations to furnish information and assistance to such chief engineer upon his request therefor. (G. S. 1935, sec. 74-510; L. 1945, ch. 390, sec. 22; June 28)

82a-721. Construction of act. This act shall be construed liberally to effectuate the purposes hereof, and the enumeration of specific powers in this act shall not operate to restrict the meaning of any general grant

of power contained in this act or to exclude other powers comprehended in such general grant. (L. 1945, ch. 390, sec. 23; June 28)

82a-722. Invalidity of part. If any clause, sentence, paragraph, section or part of this act shall be adjudged by any court of competent jurisdiction to be invalid, such judgment shall not affect, impair or invalidate the remainder thereof, but shall be confined in its operation to the clause, sentence, paragraph, section or part thereof directly involved in the controversy in which such judgment shall have been rendered, and it shall be presumed that the legislature would have enacted this law with the section, subsection or clause held to be invalid, omitted. (L. 1945, ch. 390, sec. 24; June 28)

Procedure Under the Act as Regulated by the Chief Engineer.

Every person intending to acquire an appropriation right to any of the waters of the state for beneficial use other than domestic use may do so only by making an application to the chief engineer of the division of water resources for a permit to make such appropriation. Application forms for this purpose may be obtained from the Division of Water Resources, State Board of Agriculture, Topeka.

A sample application to illustrate the nature of the information needed on the form will be found on page 20.

A brief description of the kind of information to be furnished in each part of the application is given in the following paragraphs. The number of each paragraph corresponds to a similarly numbered item in the application form.

(1) State name of watershed or drainage basin within which the proposed source is located.

(2) State total quantity of water desired in acre-feet per year and proposed maximum rate of diversion either in cubic feet per second, gallons per minute, or million gallons per day.

(3) State legal description of forty acre tract or tracts within which well or pump site is located.

(4) Give brief description of diverting and carrying works and estimated date of completion of such works.

(5) Needs to be filled out only if proposed works will result in an obstruction in a stream. (See sec. 82a-301 to 305, on pages 18 and 19.)

(6) Give estimated date by which it is expected that water will first be applied to the proposed beneficial use.

(7) Check proposed use.

(8) Municipal use only.

(9) Enter in appropriate space the actual number of acres of irrigable land in each 40 acre tract (each quarter-quarter section). Give legal description and name of owner of land proposed to be irrigated.

(10) The application should be accompanied by a sketch showing the location of the land to be irrigated and the location of the well or point of diversion. Figures 1 and 2 illustrate the nature of the information desired.

(11) Fill out only when the source is artesian water.

(12) Give number of wells and diameter and depth of each.

(13) Describe pump and power unit. If equipment has not been contracted for, give best information available.

(14) Show applicant's interest in application as owner, agent, tenant or otherwise.

The application should be signed before a notary public.

On a separate sheet state details as to any extraordinary circumstances not covered elsewhere in the application. Where water is proposed to be diverted from a well, describe the location of any other irrigation, municipal or industrial wells located near the proposed well.

Following are the steps which must be completed to obtain a certificate of appropriation:

(1) Upon receipt of the application, it will be given a priority number, and thereafter will be examined as speedily as possible to determine its sufficiency. If found defective, inadequate or insufficient the application will be returned for correction, but it will retain its priority of filing, provided acceptable data, proofs, maps, plans and drawings are filed within 30 days of the date of the return of the application or such further time, not exceeding one year, as may be given.

(2) If the application is in proper form and the proposed beneficial use will not conflict with an existing use and will not prejudicially and unreasonably affect the public interest, it will be approved subject to certain terms, conditions and limitations specified in the notice of approval. The approval will give a definite time limit within which the proposed works are to be completed and water actually applied to the proposed use. An extension of that time may be given for good cause shown by the applicant.

(3) When the construction of works is completed and the quantity of water proposed to be appropriated has been applied to the proposed use during a period of one calendar year, subsequent to approval of the application and within the time allowed, or any authorized extension of that time, the applicant shall notify the Chief Engineer to that effect. Failure to so notify the Chief Engineer within that time or to request an extension of

time, if additional time is necessary, may result in forfeiture of priority.

(4) When the notice of completion of works and the actual application of water for the intended beneficial use has been received, the Chief Engineer or his authorized representative will examine the completed project. The applicant should have sufficient records to enable him to furnish information as to the rate and quantity of water applied to use under his application. A record of the number of hours pumped is ordinarily sufficient if the capacity of the pumps under operating conditions has been or readily can be determined. The extent of the appropriation will be limited: First, to the rate and quantity for which the application was approved; and second, to the rate and quantity found to have actually been applied to the proposed use during one calendar year within the time allowed in the approval of the application, or any authorized extension of that time.

(5) If it is found that the appropriation diversion works have been completed and the appropriation right perfected in conformity with the approval of the application, a certificate of appropriation will be issued. The original of the certificate will be sent to the applicant and it is required that he record it with the register of deeds in the county wherein the point of diversion is located. When that is done the appropriation is completed.

A certificate of appropriation is intended to grant a continuous right to use of certain waters for a definite beneficial purpose and at a definite location, subject to any prior rights. It does not authorize any use of water at such times and in such manner as to interfere with prior rights of other users from the same source. The statute provides that the right of the appropriator shall

terminate when he ceases for three years or more to use it for the beneficial purposes authorized in the certificate.

The 1945 Act does not require a permit to construct a well or other diversion works or to divert and use water from any source. It provides procedure whereby a prospective water user may acquire a water appropriation and establish the relative priority of his appropriation with respect to that of any other user from the same source. An appropriation or vested right may be enforced by injunction proceedings against diversions by a user with a later appropriation or with no appropriation if it can be shown that such use interferes substantially with the rights of the earlier appropriator.

APPENDIX C

APPENDIX C

APPENDIX C.

THE STATE OF KANSAS, ex rel. BERNARD PETERSON, County Attorney of Harvey County (MAX REGIER, County Attorney of Harvey County, substituted), *Plaintiff*, v. THE KANSAS STATE BOARD OF AGRICULTURE et al., *Defendants*.
(149 P. 2d 604)

SYLLABUS BY THE COURT

WATERS—*Water Rights between Individuals—Appropriation—Regulation.* We have no statute which authorizes the Division of Water Resources of the State Board of Agriculture or its chief engineer to regulate, allocate or distribute, or otherwise interfere with the use and consumption of underground waters, or to conduct a hearing upon the application of anyone desiring to use such waters for the allocation, distribution or regulation thereof.

Original action in quo warranto. Opinion filed June 10, 1944. Judgment for plaintiff.

Bernard Peterson, Max Regier and *J. G. Somers*, all of Newton, were on the briefs for the plaintiff.

Warden L. Noe, special assistant attorney general, and *Vincent Hebsch*, of Wichita, argued the cause, and *A. B. Mitchell*, attorney general, *Eldon Wallingford*, assistant attorney general, and *K. W. Pringle*, of Wichita, were on the briefs for the defendants.

The opinion of the court was delivered by

HARVEY, J.: This is an original action in quo warranto brought by the state on the relation of the county attorney of Harvey county. The defendants are the State Board of Agriculture, the Division of Water Resources within that board, and its chief engineer. The purpose of the action is to inquire into the authority of defendants to regulate the taking of subterranean waters for beneficial uses and to allot the same among such users. The facts are not controverted and the action is presented to

this court upon plaintiff's motion for judgment on the pleadings.

The pertinent facts as shown by the record may be summarized as follows: In Harvey and McPherson (and perhaps other) counties is a geological formation known as the Equus Beds. (See University Geological Survey of Kansas, Vol. II, pp. 287 to 296, for more detailed description.) This is alleged to cover an area about thirty miles east and west and seventy miles long. The Equus Beds are filled with water of excellent quality for domestic purposes. The city of Newton, situated about seven miles east of these beds, since 1899 has obtained its entire water supply for the use of the inhabitants of the city from the Equus Beds. The cities of Burrton and Halstead, situated within the Equus Beds, also obtain their water supply therefrom. About May, 1940, the city of Wichita leased land within the Equus Beds and put down as many as twenty-five wells, from which water is pumped and conveyed by pipes more than twenty miles to the city of Wichita and there used to supply water to the inhabitants of the city. This work was practically completed by September 1, 1940, at a cost of approximately $2,500,000. On March 31, 1943, the city of Wichita made an application in writing to the chief engineer of the Division of Water Resources of the State Board of Agriculture for a permit approving the appropriation and application to the beneficial use by the inhabitants of the city of Wichita and its environs, including defense and industrial plants, of water from the Equus Beds to the extent of not less than thirty-five cubic feet per second to a maximum of fifty cubic feet per second; stating the appropriation had commenced September 1, 1940, and that this was the only adequate supply of wholesome water available, and prayed that the application be set for hearing and granted. Notice of the filing of the application was published in the Newton newspapers advising persons interested, who desired to do so, to file protests with the chief engineer of the Division of Water Resources within

thirty days after the first publication of the notice. Written protests were filed by the cities of Newton, Halstead and Burrton. The application and protests were set for hearing on September 13, 1943. Due notice was given to the cities of Wichita, Newton, Burrton and Halstead, also to the cities of McPherson, Moundridge, Hesston, Sedgwick, Valley Center, Galva, Canton and Inman, all within or near the Equus Beds. Since the protests filed raised the question of the authority of defendants to pass upon the application, the hearing was continued pending the bringing and determination of this action.

None of the users of water from the Equus Beds had made application to defendants for a permit to use the same, and at the present time there is ample for the needs of all of them. Therefore, the purpose of the action appears to be to determine the authority of defendants to control the use of the water in the Equus Beds, and particularly their authority to allot it among various claimants.

On behalf of plaintiff it is contended that there is no authority for defendants to regulate the use of the water in question among the cities or others now using it, or to allot such water, with certain quantities to one or another, and perhaps to deny to some the right to use it at all. On behalf of defendants it is contended that this authority is found in our statutes, and particularly in G. S. 1935, 24-901 to 24-905.

These contentions make it advisable to examine our statutes and decisions, so far as pertinent here, relating to water and its users.

From the beginning of our history as a state (Territorial Laws 1855, ch. 96, Laws 1862, ch. 135, G.S. 1935, 77-109) the common law of England has been the basis of the law of this state, and except as modified by constitutional or statutory provisions, by judicial decisions, or by the wants and needs of the people, it has continued to remain the law of this state. Our decisions over the years

have held the common law to be applicable to water and the rights of parties thereto except and to the extent it has been modified by statutes, judicial opinions, or the wants and needs of the people. In *Shamleffer v. Peerless Mill Co.*, 18 Kan. 24 (1877) it was held:

"Every man through whose land a stream of water runs is entitled to the flow of that stream without diminuition or alteration."

The decision was based upon the common law and it was said:

"This right he has as an incident to the property in his land, and he cannot be deprived of it but by grant, actual or presumptive. . . . [It] is not what is called an easement, because it is inseparably connected with, and inherent in, the property in the land; it is a parcel of the inheritance, and passes with it." (pp. 32, 33.)

In *City of Emporia v. Soden*, 25 Kan. 588, where Soden, having acquired the right to do so, built a dam, formed a pond to use in the operation of his mill, and the city bought property adjoining the pond and put down a well, from which it undertook to take the underground waters from the pond, it was held:

"While the general doctrine in respect to underground water percolating through the soil is, unquestionably, that the owner of the land may appropriate it to any use, and in any amount, and without reference to the effect of such appropriation upon his neighbor's land or supply of water, yet it is limited to this extent, that he may not thus indirectly destroy or diminish the flow of a natural surface stream to the injury of a riparian owner thereof." (Syl. ¶3.)

On a motion for rehearing (26 Kan. 492) it was held that if the city desired to take the water from Soden's dam either through a pipe directly into it or through the percolating waters at the bottom of its well it would have to acquire the right to do so by condemnation proceedings.

In *Wood v. Fowler*, 26 Kan. 682 (1882) it was held:

"A riparian owner owns only to the bank and not to the center of a navigable stream,"

and that "the title to the bed of the stream is in the state." (p. 689.) These conclusions followed the common law. (See pp. 689, 690.)

Pertinent common-law rules respecting water and the right to its use are stated and applied in *A. T. & S. F. Rld. Co. v. Long*, 46 Kan. 701, 27 Pac. 182 (1891); *Mo. Pac. Rly. Co. v. Keyes*, 55 Kan. 205, 40 Pac. 275 (1895), and *Parker v. City of Atchison*, 57 Kan. 29, 48 Pac. 631 (1897). In *Campbell v. Grimes*, 62 Kan. 503, 64 Pac. 62 (1901), it was held a lower riparian proprietor may enjoin an upper one from diverting waters from the stream which he did not apply to some beneficial use, and this right was based upon the common law. In *Irrigation Co. v. Klein*, 63 Kan. 484, 65 Pac. 684 (1901), the court held the use of water for irrigation is a public use in this state for which the legislature may authorize a private person or corporation to exercise the power of eminent domain; and further held the legislature had authorized such condemnation proceedings in at least a part of the state by chapter 133 of the Laws of 1891, and apparently in all the state by chapters 95 and 151 of the Laws of 1899. In *Clark v. Allaman*, 71 Kan. 206, 80 Pac. 571 (1905), after an extensive review of our statutes and decisions, it was held:

"The use of the water of a running stream for irrigation, after its primary uses for quenching thirst and other domestic requirements have been subserved, is one of the common-law rights of a riparian proprietor." (Syl. ¶ 10.)

In that case the district court had "apportioned the water among the various claimants according to the law of prior appropriation in vogue in certain of the Rocky Mountain states, rejecting altogether the rules of the common law relating to riparian rights." The judgment was reversed, the court holding, however, among other things:

"The doctrine of prior appropriation may exist in the same state with the common-law doctrine of riparian rights," if there is statutory authority therefor.

In *Gilmore v. Salt Co.*, 84 Kan. 729, 115 Pac. 541 (1911), it was held that one has no right to accumulate upon his own land refuse matter of any sort by which the water underlying the land of a neighbor, and feeding springs thereon, is so affected through percolation as to be unfit for its ordinary use, citing *City of Emporia v. Soden*, supra, and other authorities.

In *State, ex rel., v. Akers*, 92 Kan. 169, 140 Pac. 637 (1914), affirmed in *Wear v. Kansas*, 245 U. S. 154, the validity of chapter 259 of the Laws of 1913, was involved. This authorized the state to make a charge for the taking of sand from the bed of the Kansas river for commercial purposes. The court held the river to be a navigable stream and the bed of the river to be the property of the state, and sustained the statute. In a lengthy opinion, reviewing many authorities, the common-law doctrine pertaining to the matter was announced and approved and our earlier cases cited and followed.

In *Feldhut v. Brummitt*, 96 Kan. 127, 150 Pac. 549 (1915), the court was asked to adopt the doctrine of the western states with respect to irrigation. The court declined to do so, saying:

"In eastern Kansas the Idaho or arid states' doctrine would be entirely inappropriate; in central Kansas it would be of doubtful propriety; in the extreme parts of western Kansas it might do very well; but no court has power to divide this state, like all Gaul, into three parts, and impose a peculiar doctrine upon our western frontier." (Citing *Clark v. Allaman*, 71 Kan. 206, 80 Pac. 571) (p. 129)

In *Wallace v. City of Winfield*, 96 Kan. 35, 149 Pac. 693 (1915), it was held a city which had become a riparian

owner of the water of a stream had no special or additional rights to such water as against a lower proprietor or one who had acquired prospective rights to the unobstructed flowage of the stream, and that the city by purchasing the land abutting on the stream acquired the rights of a riparian owner, "which is the reasonable use of water for domestic and other ordinary purposes incident to the land, but it does not thereby acquire the right to divert or take water from the stream for the purpose of selling it to the inhabitants of the city without making compensation to those who are thereby deprived of water rights." (Citing *City of Emporia v. Soden*, supra, and other cases; and see the companion case of *Wallace v. City of Winfield*, 98 Kan. 651, 159 Pac. 11 (1916), in which the right of the city to condemn was sustained, following *Irrigation Co. v. Klein*, supra, and *Clark v. Allaman*, supra.)

In *Piazzek v. Drainage District*, 119 Kan. 119, 237 Pac. 1059 (1925), the difference between a navigable stream and one that is non-navigable is discussed, and it was held that the title to the bed of non-navigable streams is in the riparian owners and not in the state, and that a patent from the government conveying land through which a non-navigable stream flows conveys to the patentee the bed of the stream, following the common-law doctrine and our earlier cases.

In *Durkee v. Bourbon County Comm'rs*, 142 Kan. 690, 51 P. 2d 984 (1935), this court applied the common-law doctrine of the right to the water in a running stream which had been diverted for road-building purposes, citing our earlier cases.

In *Frizell v. Bindley*, 144 Kan. 84, 58 P. 2d 95 (1935), the court held our statute (G. S. 1935, 42-101), which authorized the riparian owner to appropriate water for irrigation purposes, ineffectual to confer on him priority as against riparian owners under United States land

patents which antedated the statute. The court quoted at length from *Shamleffer v. Peerless Mill Co.*, supra (p. 33), respecting the common-law rights of riparian owners, and said: "There has been no departure from this rule of law by this court." And in *Smith v. Miller*, 147 Kan. 40, 75 P. 2d 273 (1938), the court had occasion to say:

"Under the common law as frequently declared by this court, water in the natural channel of a running stream is an inseparable attribute of the land through which the stream flows. In legal parlance it is part and parcel of the land itself." (p. 42)

In the recent case of *State of Colorado v. State of Kansas*, 320 U. S. 383, 64 S. Ct. 176, two paragraphs of the headnote read:

"Under the common law of Kansas, a riparian owner is entitled to reasonable use of waters of a stream for irrigation, but such use is subject to rights of other riparian owners to a like reasonable use.

"Under the common law of Kansas, what is a reasonable use of waters of a stream for irrigation by riparian proprietor must, in each instance, be determined in the light of total supply and total need of all riparian proprietors." (pars. 6, 7)

While the above list of our authorities is not designed to be complete, it is sufficient to show, we think, that throughout the history of the state there has been no departure from the basic principle that water rights in this state are governed by the common law except as they may have been modified by statute. While the statements of facts are not very full in some respects, it would appear from the pleadings before us that in the use of the water in the Equus Beds the various cities here involved have acted under their rights in harmony with common-law principles and the decisions here-

inbefore cited. That is to say, it appears that those desiring water from the Equus Beds have contracted for the right to obtain it and have used it as an owner of the land might use it. No question of its drainage by one user from another appears yet to have arisen, but if so, no reason suggests itself why it cannot be handled under the principles of the decisions cited above applicable thereto.

Under the above authorities underground waters are part of the real property in which they are situated. The owner of land may convey or grant the underground water, or the right to take it from the land, by an appropriate instrument in writing to the same extent that he might convey or grant any other portion of the real property; or a party, having the right of eminent domain, may appropriate underground water to his use by condemnation proceedings.

Defendants concede our decisions respecting water have followed the common law, but contend the position for which they argue here has not been considered by the court in its former cases. The point is not well taken, as an examination of the cases will disclose.

Defendants ask us to take judicial notice of the fact that:

"Both surface and underground waters are [to some extent] migratory and under natural laws of gravity seek their own lowest level."

Judicial notice may be taken of those facts as well as of the fact that by evaporation waters become elevated and mingle with the atmosphere. Defendants in their brief state:

"The corpus of the water in its natural state, and this includes water beneath the surface of the ground, is flowing, moving, circulating, oozing, filtering, percolating or falling from the physical confines of the realty owned by one person to realty owned by another."

As a general statement this may be conceded. They further assert:

"In this natural state the corpus of the water is not the exclusive property of any individual but is a public water resource."

This statement is too broad. An owner of land owns its surface and underground water by the same title as he owns the land itself, and the clay, gravel, coal or oil within it, even though these items of property differ in component parts. The land itself, or any of its parts, is a public resource in the sense that it may be taken for a public use, or the state may prohibit its waste or its use in a manner detrimental to others.

Defendants further advise us:

"Defendants do not recognize any private property right in unused water (20-158 Kan.) or in unused sources of water supply and believe that only when an established right or appropriation authorizing a user to take and use from that source is diminished or extinguished to point of causing injury to his prior established appropriation can the user recover any substantial damage or maintain any action for injunctive relief."

This doctrine seems somewhat startling. All we care to say about it is that we think it contrary to the law of this state, repeatedly stated in our decisions hereinbefore discussed.

Our satutes pertaining to waters, their ownership, disposition and use have been builded about the common-law doctrines enumerated in the decisions above set out. Most of such statutes in force at the time were collected in G. S. 1935, chapter 24, pertaining to drainage and levees; chapter 42, pertaining to irrigation; chapter 59, pertaining to power plants and dams; chapters 74-506 to 74-510, pertaining to division of water resources, and chapter 82a, pertaining to water and watercourses. Changes made by the legislature in these statutes are noted in the G. S. 1943

Supplement. Some of these statutes took cognizance of the right to use water by appropriation, as chapter 115 of the Laws of 1886; G. S. 1935, 42-101 to 42-108, repealed in part by chapter 261 of the Laws of 1941; also chapter 133 of the Laws of 1891, G. S. 1935, 42-301 to 42-3,111, which related to the use of water for industrial purposes west of the 99th meridian; and chapter 210 of the Laws of 1911, relating to artesian wells, defined as those sunk to the artesian stratum or basin over 400 feet deep and the use of the water therefrom. Each of these statutes, however, recognized the common-law doctrine of the right of the landowner to the running waters or the underground waters on his land, and required others who desired to use such waters to obtain the right to do so by contract or by condemnation proceedings.

By chapter 172 of the Laws of 1917 the legislature created a commission to be known as the Kansas Water Commission and provided how its members should be chosen. By chapter 218 of the Laws of 1919 the legislature created a Division of Irrigation within the State Board of Agriculture, provided for the appointment of a commissioner, and designated where he should hold his office. In 1927, by chapter 293, the Kansas Water Commission and the Division of Irrigation were specifically abolished and there was created a Division of Water Resources within the State Board of Agriculture. All of the authority, power and duties then conferred or imposed by law upon the Kansas Water Commission and the State Irrigation Commission were conferred upon the Division of Water Resources, and as amended by section 7 of chapter 271 of the Laws of 1933, the State Board of Agriculture was authorized to employ a chief engineer and such other expert assistants, clerical and other help as might be necessary properly to carry out the provisions of the statutes.

The duties transferred to the Division of Water Resources by chapter 293 of the Laws of 1927, from chapter

172 of the Laws of 1917, sections 4 to 8, inclusive, now G. S. 1935, 24-901 to 24-905, read as follows:

"As soon as practicable after organization the commission shall in conjunction with the federal government by way of securing financial and professional aid and assistance, work out a systematic general plan for the complete development of each watershed in the state in order to secure the most advantageous adjustment of the interest involved in matters of floods, drainage, irrigation, water power and navigation. Where any department of the federal government is now or hereafter may be engaged in the development of plans, affecting any of the subjects referred to in this act this commission may cooperate with such federal department. Water development of all kinds throughout the state shall conform to the general plans adopted by the commission.

"This commission is hereby authorized and directed to establish and maintain river gauging stations and to make such surveys and other investigations as may be necessary to a complete knowledge of the subjects herein assigned to it for investigation.

"The following principles shall guide the commission in its decisions and plans: (a) Surface or underground waters of the state may be appropriated by the federal government by civic decisions, by corporations, and by individuals upon application to the commission and in accordance with the rules and regulations it may prescribe. Such appropriation shall not constitute absolute ownership of such waters, but shall remain subject to the principle of beneficial use. (b) Where appropriations of water for different purposes conflict they shall take precedence in the following order, namely: domestic and transportation water supply, irrigation, industrial uses, water power. In each of these decisions prior application is to govern in making allotments. (c) Appropriation in excess of the reasonable needs of the appro-

priators not to be allowed. (d) Waters appropriated for irrigation are to become appurtenant to the lands to which they are applied, and underground waters for all purposes to become appurtenant to the lands under which they flow.

"The commission shall study the laws of the state relating to floods, drainage and irrigation with a view to making such revisions as may be necessary to accomplish the ends prescribed in this act, and they shall report the results of their investigation and make such recommendations as they may deem proper to the legislature from time to time.

"The commission and its agents shall have the power of entry on private lands for the purpose of carrying out the provisions of this act."

On behalf of defendants it is argued that the sections of the act of 1917 above set out have thrown off "the old common-law doctrine as voiced by the court in *Clark v. Allaman*, 71 Kan. 206, 80 Pac. 571, not only as to underground waters but also as to streams and other surface water resources as well." We think the statute had no such effect. In the twenty-seven years since the statute was enacted the court has continued to recognize the common-law doctrine respecting water as set forth in *Clark v. Allaman*, supra, and earlier cases, and the legislature has continued to base statutes upon the common-law doctrine with respect to water rights even down to and including chapter 262 of the Laws of 1941. Defendants stress the last sentence in G. S. 1935, 24-901: "Water developments of all kinds throughout the state shall conform to the general plans adopted by the commission." We are not advised that any such general plans ever have been adopted. The same section of the act made it the duty of the commission to "work out a systematic general plan for the complete development of each watershed in the state in order to secure

the most advantageous adjustment of the interest involved in matters of floods, drainage, irrigation, water power and navigation." We are not advised that this has ever been done. We are advised that the Commission of Water Resources and its chief engineer, in cooperation with the U. S. Geological Survey and the State Geological Survey, have made surveys and reports on ground water resources in Kansas for seven counties in the state and limited or partial reports for four other counties; that reports are in preparation for four more counties and some field work has been done in five other counties; so this work is far from complete. In the next paragraph the commission was authorized to establish and maintain river gauging stations. We understand that such stations have been established and maintained. The next section outlines certain principles which shall guide the commission in its work, and the next section makes it the duty of the commission to study the laws of the state relating to floods, drainage and irrigation with a view of making such revisions as may be necessary to accomplish the ends prescribed by the act and to make a report of such investigations and make such recommendations as it deems proper to the legislature from time to time. We are not advised that any such recommendations have ever been made to the legislature. Defendants stress some of the language in G. S. 1935, 24-903, and contend that this language gives the Division of Water Resources and its chief engineer the authority to entertain applications for and conduct hearings and make appropriations of water among different users thereof. This section contains statements confusing, to say the least, and to some extent contradictory and difficult if not impossible to apply as a specific grant of authority for the commission to act. The meaning of the section is clear enough if it be regarded simply as a guide to the commission in doing the things it is specifically authorized and required to do by G. S. 1935, 24-901 and 24-904; and this is the interpretation we give to it.

The duties transferred to the Division of Water Resources by chapter 293 of the Laws of 1927, from chapter 218 of the Laws of 1919, section 4, now G. S. 1935, 74-509, read as follows:

"It shall be the duty of such irrigation commissioner: (1) To gather data, information and statistics from the existing irrigation plants in the state concerning the water supply and methods of securing the same and the methods employed in applying water to crops, and he shall tabulate and preserve in available form such information and shall publish and distribute the same from time to time; (2) to visit the site of any proposed irrigation plant in the state upon the request of any citizen of the state and advise as to the feasibility of installing such plant and furnish plans and specifications therefor upon request, such visits to be made only when his actual expenses therefor are guaranteed by the person requesting such visit; (3) to operate by lease under competitive bids all existing irrigation plants now owned by the state of Kansas, and installed by the Board of Irrigation, Survey, Experiment and Demonstration, or the state irrigation commissioner, until such time as he shall have determined the feasibility of irrigation under conditions existing at each of such plants, and all proceeds from the operation of any such plants shall be paid into and become a part of the funds herein provided, for the payment of the expenses of conducting such department; (4) to immediately take charge of all property of every kind and nature now belonging to the state of Kansas and heretofore purchased or otherwise acquired by the Board of Irrigation, Survey, Experiment and Demonstration, and the state irrigation commissioner and shall have authority to sell and dispose of any such property not including real estate and not necessary for carrying out the work of such department; (5) to make quarterly reports to the State Board of Agriculture, including itemized accounts of all receipts and expenditures of such department." (G. S. 1935, 74-509.)

There is nothing in that statute which authorizes the Division of Water Resources or its chief engineer to conduct the hearing and make the orders contemplated by the proceeding here involved.

In 1933 the legislature passed an act (Laws 1933, ch. 206) making it "the duty of the division of water resources of the state board of agriculture, under the direction of its chief engineer and other officers and employees, to distribute the water in any natural stream among the several ditches or water users taking water from such stream, according to the rights of each as adjudicated by court decree." This and other sections of the statute are now G. S. 1935, 74-509b to 74-509e, inclusive. In each of the sections the duties imposed upon the Division of Water Resources and its chief engineer are simply to assist in carrying out decrees of the court. At no place in the statute is the Division of Water Resources or its chief engineer given authority to make any order of distribution of water among users thereof.

No statute cited to us, and none which we have found by our own research, authorizes the defendants, or any of them, to regulate, allocate or distribute, or otherwise interfere with the use and consumption of underground waters or to conduct a hearing upon the application of anyone desiring to use such waters, or for the allocation, distribution or regulation of the use of such waters.

The result is judgment should be for the plaintiff as prayed for in its petition. It is so ordered.

FILED
SEP 4 1956
JOHN T. FEY, Clerk

No. 285

In the Supreme Court of the United States.

OCTOBER TERM, 1956

J. H. BAUMANN and MARGUERITE MARIE JACOBSON, *Appellants*,

vs.

ROBERT V. SMRHA, as Chief Engineer of the Division of Water Resources of the Kansas State Board of Agriculture, *Defendant-Appellee*,

and

THE CITY OF WICHITA, KANSAS, a Municipal Corporation, *Intervener-Appellee*.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS, 3-JUDGE COURT.

MOTION TO DISMISS OR AFFIRM AND BRIEF

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INDEX

PAGE

MOTION TO DISMISS OR AFFIRM 3

INTRODUCTION 4

QUESTIONS INVOLVED 4

I. It is manifest that the questions presented by the appellants in this appeal, and on which a decision depends, are so unsubstantial as not to merit or need further argument, 4

A. Appellants are not deprived of any property rights in water, or the use thereof. The act provides procedure for determination of existing vested right uses, and security as against subsequently initiated uses 5

B. Appellants misconstrue the court decision, the State of Kansas, ex rel., Bernard Peterson, etc., vs. The Kansas State Board of Agriculture, et al., 158 Kan. 603, 149 Pac. 2d 604 (Appendix C, Appellants' Jurisdictional Statement) 11

C. The Kansas Water Appropriation Act of 1945 is a conservation statute which gives stability to water rights; encourages and protects beneficial use of water; and discourages and prohibits waste and nondevelopment of a valuable natural resource—water 14

Title of Act Is Not Defective 21

D. Appropriation permits under the water act of 1945 are necessarily granted, subject to valid existed vested rights, and to prior appropriations, and the act provides for protection of those rights either by action for damages or by injunction under sections 82a-712 and 82a-716 22

CONCLUSIONS 14

INDEX TO AUTHORITIES

CASES

	PAGE
Artesian Valley Water Conservation Assn. v. Division of Water Resources, 174 Kan. 212, 255 Pac. 2d 1015	23
Atchison v. Kansas State Highway Commission, 161 Kan. 661, 171 Pac. 2d 619	16
City of Emporia, *et al.*, v. Soden, 25 Kan. 588; 37 A. R. 265	7
Gallerani v. United States (Mass. 1941) 41 F. Supp., 293	17
Mizer v. Irrigation District, 172 Kan. 157, 235 Pac. 2d 370	14
Ohio Oil Co. v. State of Indiana, 117 U. S. 190, 44 L. Ed. 729	19
O'Neil v. Northern Colorado Irrigation Company, 242 U. S. 20	19
Sauer v. New York, 206 U. S. 536; Chicago & Alton R. R. Company v. Tranbarger, 238 U. S. 67	19
Sester v. Belvue Drainage District, 162 Kan. 1, 173 Pac. 2d 619,	16
State of Kansas, *ex rel.* Bernard Peterson, etc., v. The Kansas State Board of Agriculture, *et al.*, 158 Kan. 603, 149 Pac. 2d 604	5
State, *ex rel.*, etc., v. Knapp, 167 Kan. 546, 207 Pac. 2d 440	13
Utah Copper Company v. Stephen Hayes *et al* (Utah) (1934) 31 Pac. 2d 624, 628	10
Wilson v. New Bedford, 108 Mass. 265	8

STATUTES

Article 7, Chapter 82a, G. S. Kansas, 1949	4
Chapter 172, Laws of Kansas, 1917	11
Section 82a-704	22
Sections 82a-712 and 82a-716	5
Section 77-109, G. S. Kansas, 1949	7
Chapter 236, Laws of Kansas, 1915	12
Chapter 293, Laws of Kansas, 1927	12

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J. H. BAUMANN and MARGUERITE MARIE JACOBSON, *Appellants*,

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and

THE CITY OF WICHITA, KANSAS, a Municipal Corporation, *Intervener-Appellee*.

No. 285

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS, 3-JUDGE COURT.

MOTION TO DISMISS OR AFFIRM

Comes now the above named defendant-appellee, and moves the honorable court for an order dismissing or affirming the above entitled case on the ground and for the reason that it is manifest, that the questions presented, and on which the decision of the cause depends, are so unsubstantial as not to need further argument.

BRIEF

INTRODUCTION

The final judgment of the United States District Court for the District of Kansas (3-Judge Court) was entered on April 30th, 1956, upholding the federal constitutionality of the Kansas Water Appropriation Act of 1945. (Article 7, Chapter 82a, G. S. Kans., 1949.) This decision is included as Appendix A, in the appellants' Jurisdictional Statement, in this case.

The appellants submit five questions (Jurisdictional Statement, Page 3) as being presented for the consideration of this court, on appeal. All of these are based on the premise that under the statute, appellant landowners are divested of a property right in water, or in the use thereof. This is a false premise. The statute does not take property from appellants.

QUESTIONS INVOLVED

I. It is manifest that the questions presented by the appellants in this appeal, and on which a decision depends, are so unsubstantial as not to merit or need further argument.

A. Appellants are not deprived of any property rights in water, or the use thereof. The act provides procedure

for determination of existing vested right uses, and security as against subsequently initiated uses.

B. Appellants misconstrue the court decision, *The State of Kansas, ex rel., Bernard Peterson, etc., v. The Kansas State Board of Agriculture, et al.*, 158 Kan. 603, 149 Pac. 2d 604 (Appendix C, Appellants' Jurisdictional Statement).

C. The Kansas Water Appropriation Act of 1945 is a conservation statute which gives stability to water use rights; encourages and protects beneficial use of water; and discourages and prohibits waste and nondevelopment of a valuable natural resource—water.

D. Appropriation permits under the water act of 1945 are necessarily granted, subject to valid existed vested rights, and to prior appropriations, and the act provides for protection of those rights either by action for damages or by injunction, under sections 82a-712 and 82a-716.

A. APPELLANTS ARE NOT DEPRIVED OF ANY PROPERTY RIGHTS IN WATER OR THE USE THEREOF. THE ACT PROVIDES PROCEDURE FOR DETERMINATION OF EXTENT OF EXISTING VESTED RIGHT USES, AND SECURITY AGAINST SUBSEQUENTLY INITIATED USES.

Appellants contend they own the water underlying their land and had a vested property right in the use thereof. (Statement, page 25.)

They argue that the Equus Beds constitute an underground stream. First, let it be noted that the factual find-

ing, as stated by Judge Phillips in the District Court Decision was as follows:

> "Such lands are located in what is known as the 'Equus Beds,' a geological formation containing water of a quantity suitable for domestic, municipal, irrigation, and other purposes. The Equus Beds is a ground water reservoir composed of extremely permeable gravel and sand, occupying the channel of an ancestral Smoky Hill River, which flowed into an ancestral Arkansas River. Such Beds cover an area extending approximately 55 miles north and south between Wichita and Lindsborg and approximately 25 miles east and west and located principally in the Counties of Sedgwick, Harvey and McPherson, in the State of Kansas. The ground water within the reservoir moves generally toward the Little Arkansas River, except in the northern part, where there is a movement toward the Smoky Hill River. There has been and now is a 'draw-down' of the water table under plaintiffs' lands. Such Beds provide natural sub-irrigation for plaintiffs' lands and plaintiffs have been and are using Equus Beds water for domestic purposes."

There is no factual finding that the Equus Beds constitute an underground stream but rather a finding that the porous material, the permeable gravel and sand, serve as a media for the percolating water and that such ground water constitutes a reservoir; that the sand and gravel occupy the channel of an ancestral and historical stream channel. The channel of a former stream being filled with gravel and sand, negatives the existence of any under-

ground stream. There are no underground streams in Kansas. Percolating water may move underground in various directions, or generally in a single direction, without losing identity as percolating waters. Water will seek its own level and the gravel and sand in the reservoir slows such movement.

The common law was adopted in Kansas, first by the territorial legislature, and then by the first legislature of the state (77-109 G. S. Kans., 1949). It was adopted subject to modifications, made by constitutional and statutory law, by jurisdictional decisions, and by the wants and needs of the people. This early statute further provided that the common law rule, "that statutes in derogation of the common law should be strictly construed" should not be applicable in Kansas. This act provided, that all statutes in derogation of the common law should be liberally construed to promote their object. The appellants acquired a patent to their land after this statute was enacted. This statute was in effect at the time the patent was issued to appellants' predecessors in title (1880). The Supreme Court of Kansas early announced the property rule applicable to groundwater, in *City of Emporia, et al., v. Soden,* 25 Kan. 588; 37 A. R. 265.

"Syllabus 3. *Underground Percolating Water, Use of; Limit.* While the general doctrine in respect to underground water percolating through the soil is, unquestionably, that the owner of the land may appropriate it to any use, and in any amount, and without reference to the effect of such appropriation upon his neighbor's land or supply of water, yet it is limited to this extent, that he may not thus indirectly destroy or diminish the flow of a natural surface stream to the injury of a riparian owner thereof."

On p. 608 of the opinion the court quoted with approval from *Wilson v. New Bedford*, 108 Mass. 265, as follows:

"A final matter, applicable solely to the well, and the most serious and difficult question in the case, is, that as the water enters only by percolation through the soil, the law will permit no inquiry into the sources of supply, or the effect of such percolation upon the quantity of water in any other tract of land. It is doubtless true, as a general proposition, that the law takes no cognizance of percolating water. The impossibility of proving with reasonable certainty the sources of supply, is a strong if not the principal reason therefor. But upon whatever founded, the doctrine may be considered settled. Chief Justice Chapman, in delivering the opinion of the court in the case of *Wilson v. New Bedford*, 108 Mass. 265, says: 'The percolating water belongs to the owner of the land as much as the land itself, or the rocks and stones in it; therefore he may dig a well, and make it very large, and draw up the water by machinery or otherwise, in such quantities as to supply aqueducts for a large neighborhood. He may thus take the water which

> would otherwise pass by natural percolation into his neighbor's land, and draw off the water which may come by natural percolation from his neighbor's land.' "

This was the law in Kansas at the time of the enactment of the Water Appropriation Act of 1945. The rule announced in Soden case was quoted with approval in the Peterson case (*supra*) in 1944, just prior to enactment of the Appropriation Act in 1945.

The appellants, in contending that groundwater is a part and parcel of the real estate, which cannot be affected by any legislature enactment, or jurisdictional assertion, are being unrealistic. "The dog in the manger attitude" which they seek to maintain, would create a stalemate. It would prevent any beneficial use being made of groundwater by the appellants and by their neighbors. The appellants could not take water from under their own land under the concept which they urge, because such "taking" would lower the water table level under their neighbor's land, through a percolating process. This is the same concept which they seek to have invoked, to prevent the owners of adjacent land from taking water from beneath the surface of the ground. If any such taking or use of ground water lowers the water table of the lands of the appellants, then appellants' use of water from the same common source of supply will have the same effect on their neighbors.

The rule announced in the Soden case is quite the contrary. Apt language was used in the case of *Utah Copper Company v. Stephen Hayes, et al.* (Utah) (1934) 31 Pac. 2d 624, 628, when the court stated:

> "It is settled law in this state, and, so far as we know, it is the law everywhere, that the ownership of such waters is vested in the owner of the soil through or in which they seep and percolate. This is so because they are a part of the land itself. There is a limitation, however, upon the title which one may have in such waters, growing out of the doctrine of correlative rights and reasonable use, which has been declared to be the law in this state. But, as this doctrine has no application in this case, such limitation may be disregarded herein. The defendant goes on to say that there can be no ownership in seeping and percolating waters in the absolute sense, because of their wandering and migratory character, unless and until they are reduced to the actual possession and control of the person claiming them. They belong to the owner of the soil in a limited sense as compared to other kinds of property. Their ownership consists in the right in the owner of the land to capture, control, and possess them; to prevent their escape, if he can do so, from his land; and to prevent strangers from trespassing upon his land in an effort there to capture, control or possess them. When they are reduced to actual possession or control by the landowner in whose domain they occur, they then cease to be percolating and seeping waters and become his personal property, and remain such so long, and so long only, as he keeps them in his possession or under his control. If he permits them to leave his land by seeping

> or percolating or flowing therefrom, or if they get beyond his control, he loses all right, title, and interest in them the instant they pass beyond the boundaries of his tract; and, if they enter into the lands of another, they thereupon become his property, and he then owns them by the same limited title. While the landowner may prevent the escape of such waters from his land, if he can do so, yet he has no right to follow them into the lands of another and there capture, control, or reduce them to possession. All of which is good law and sound doctrine and is not disputed by the plaintiff (citations omitted)."

B. APPELLANTS MISCONSTRUE THE COURT DECISION, THE STATE OF KANSAS, EX REL. BERNARD PETERSON, ETC., VS. THE KANSAS STATE BOARD OF AGRICULTURE, ET AL., (Supra).

Appellants contend (Jurisdiction Statement, 20) that in view of the history as set forth in the Peterson case (*supra*), there can be no question "that appellants' property rights were fully and completely vested long prior to 1945, and were not subject to be disturbed . . ." Actually the court in the Peterson case had before it an inquiry as to the authority of the Chief Engineer to regulate the taking of groundwater for beneficial use. The court reviewed the Kansas statutes on this subject. It quoted, with approval, the announcement as the law of groundwater contained in the Emporia-Soden case (*supra*). The statute creating the Kansas Water Commission (Chapter 172, Laws of Kansas, 1917) had been merged with the statute creating a

Commissioner of Irrigation (Chapter 236, Laws of Ka
sas, 1915) to create a new state agency known as the Div
sion of Water Resources of the State Board of Agricultur
This merger was contained in Chapter 293, Laws of Ka
sas 1927. In the Peterson case (p. 610), the court held th
all the authority, power and duties conferred or impose
on the water commission and the irrigation commission
were conferred on the new agency. The court quoted th
duties as embraced in sections 24-901 to 24-905, inclusiv
R. S. 1935, and stated this applied to commission water d
velopment plans. That sec. 74-509 specified the duties
the irrigation commissioner. The court found (p. 613
that:

> "There is nothing in that statute which authoriz
> the Division of Water Resources or its chief eng
> neer to conduct the hearing and make the orde
> contemplated by the proceeding here involved.
>
> "In 1933 the legislature passed an act (Laws 193
> ch. 206) making it 'the duty of the division of wat
> resources of the state board of agriculture, under th
> direction of its chief engineer and other officers an
> employees, to distribute the water in any natur
> stream among the several ditches or water use
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> and other sections of the statute are now G. S. 193
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> tions the duties imposed upon the Division of Wat
> Resources and its chief engineer are simply to assi
> in carrying out decrees of the court. At no pla

> in the statute is the Division of Water Resources or its chief engineer given authority to make any order of distribution of water among users thereof.
>
> "No statute cited to us, and none which we have found by our own research, authorizes the defendants, or any of them, to regulate, allocate or distribute, or otherwise interfere with the use and consumption of underground waters or to conduct a hearing upon the application of anyone desiring to use such waters, or for the allocation, distribution or regulation of the use of such waters."

The court held that there was no statute which granted the chief engineer of the Division of Water Resources any authority to allocate or distribute, or otherwise interfere with the use and consumption of underground waters, or to conduct a hearing upon the application of any one desiring to use such waters. All else in said decision is dicta. The implication results that, had there been an express grant of such authority, it would have been valid and constitutional. What followed? Governor Schoeppel appointed a water committee to study the problem. It made recommendations for legislation. The 1945 session adopted its recommendations with slight amendments. The Kansas Supreme Court in 1949 upheld the validity and constitutionality of said act, *State, ex rel., etc., v. Knapp*, 167 Kan. 546, 207 Pac. 2d 440.

In any event, as observed by the court below in its opinion (Appendix A, Jurisdictional Statement, p. 58) the latter case overruled the earlier Peterson case, *supra*):

> "Whether such a change in the law of Kansas is contrary to earlier decisions of the Supreme Court of Kansas, it is cognizant with the latest decision of the Supreme Court of Kansas in *State v. Knapp*, 167 Kan. 546, 207 P. 2d 440, which must be regarded as having overruled the earlier cases."

C. THE KANSAS WATER APPROPRIATION ACT OF 1945 IS A CONSERVATION STATUTE WHICH GIVES STABILITY TO WATER USE RIGHTS; ENCOURAGES AND PROTECTS BENEFICIAL USE OF WATER; AND DISCOURAGES AND PROHIBITS WASTE AND NONDEVELOPMENT OF A VALUABLE NATURAL RESOURCE—WATER.

There is no property right in any individual, or in any landowner, that the legislature "will not change the law." *Mizer v. Irrigation District*, 172 Kan. 157, 235 Pac. 2d 370. Nor is there any assurance to property owners, that the court will not reverse former announcements and decisions. In the district court, this case, the court cited authorities for, and held as follows:

> "There is no vested right in the decisions of a court and a change of decision does not deprive one of equal protection of the laws or property without due process of law.
>
> "Even though prior decisions of a state court have established a rule of property, a departure therefrom in a subsequent decision does not, without more, constitute a deprivation of property without

due process of law under the Fourteenth Amendment.

"The Fourteenth Amendment in guaranteeing equal protection of the laws does not assure uniformity of judicial decisions or immunity from judicial error. Likewise, it is well settled that a legislature may change the principle of the common law and abrogate decisions made thereunder when in the opinion of the legislature it is necessary in the public welfare.

"Adequate water supply is a necessity. In the arid and semi-arid regions of the West it is imperative that all available water be utilized beneficially and without waste. The accomplishment of those ends is well within the competency of the legislature.

"Plaintiffs have not seen fit to invoke the remedies afforded them by the Act. Those remedies are adequate, we think to afford protection to any vested rights of the plaintiffs."

Section 77-109, G. S. Kans., 1949, specifically states that the common law, the law under which appellants base their claim should be subject to change by the legislature, by the courts and when public welfare and progress demands through changes in the needs and wants of the people. No one will deny that in this present decade, the legislatures, state or national, have the right to and have taken steps to make effective, numerous conservation measures to protect natural resources, and give protection to investments made for the development and utilization

of such natural resources. A landowner cannot be permitted to stop progress, and stand in the way of legislative change, and the effectiveness of judicial decisions, simply because his property was patented before such legislation, or before such court decisions. The legislature has prescribed adequate procedure for protection against any invasion of property rights and appellants have not seen fit to invoke these remedies. The procedure provided is valid and constitutional.

The Kansas Supreme Court has held that where property was taken without any prior condemnation, an action was available for recovery of damages even though there was no specific statutory authorization for such recovery. *Atchison v. Kansas State Highway Commission*, 161 Kan. 661, 171 Pac. 2d 287. In this case there is express statutory procedure and authorization therefor. (Section 82a-712 and 82a-716.) See, also, *Sester v. Belvue Drainage District*, 162 Kan. 1, 173 Pac. 2d 619.

> "2. *Eminent Domain - Compensation - Right to Compensation.* The right to compensation for private property taken for public use under section 4, article 12 of the constitution of the state of Kansas and section 1 of the fourteenth amendment to the constitution of the United States does not extend to instances where land is not originally so taken but is only subsequently indirectly or consequentially taken or damaged."

And on page 8 the court quoted with approval from 29 C. J. S. 920, Section 111, as follows:

> "The general rule is that acts done in the proper exercise of governmental powers, or pursuant to authority conferred by a valid act of the legislature, and not directly encroaching on private property, although their consequences may impair its use or value, do not constitute a taking, under constitutional or statutory requirements of compensation for property taken and do not entitle the owner of such property to compensation, in the absence of constitutional or statutory provisions requiring compensation to be made for damaging, injuring, or destroying property, such loss being damnum absque injuria."

At the bottom of page 8 it was stated:

> "Unless a state sees fit to waive its sovereign immunity for such damages the courts cannot aid those who may sustain loss by reason of possible mistakes made by those authorized to act in behalf of the state. Some states have enacted statutes which extend the state's liability to the point of allowing recovery of damages caused by public use, but Kansas has not. (See 18 Am. Jur. 753, Sec. 129.)"

In *Gallerani v. United States* (Mass. 1941), 41 F. Supp., 293, it was stated in Syllabus 1 and Syllabus 4, as follows:

> "The United States is not liable where as a result of lawful acts in improving navigation, it drains underground waters from land not included in condemnation proceedings, thereby making such land unfit for one of purposes for which it was used,

> namely, dwelling purposes. Emergency Relief Appropriation Act of 1935, 49 Stat. 115."
>
> "Mere injury to land or to incidents of its possession, even though substantial, does not amount to a 'taking' for which compensation is required under Fifth Amendment, unless there is actual invasion of land or some property right therein which, in substance, amounts to a complete appropriation. U. S. C. A. Const. Amend. 5."

and in the opinion, page 294, it was stated:

> "The question presented is whether the United States can be held liable where, as a result of its lawful acts in improving navigation, it drains underground waters from land not included in the condemnation proceedings, thereby making such land unfit for one of the purposes for which it was used, namely, dwelling purposes. I think the answer must be in the negative. The United States does not assume a greater obligation to compensate for injury to private property than the law imposes upon a private individual under similar circumstances. (Citations omitted.) Both at common law and under the law of Massachusetts, where plaintiff's property is situated, there is no property right in underground percolating waters, and any injury resulting from the loss of same through the lawful acts of an adjoining landowner is considered damnum absque injuria. (Citations omitted.) Mere injury to land or to the incidents of its possession, even though substantial, does not amount to a 'taking' for which compensation is required under the Fifth Amendment, unless there is an actual invasion of the land or some property right therein which, in substance, amounts to a complete appropriation. (Citations omitted.)"

In the Syllabus (3 and 4), *O'Neil v. Northern Colorado Irrigation Company*, 242 U. S. 20, it is stated:

> "A judicial construction of a statute, supportable by frank reasoning, and not subversive of any earlier judicial construction upon which a party might be held to have relied, does not deprive him of due process, though it take him by surprise and come too late for him to act upon it and thus save his rights."
>
> "A departure by state decision from a rule of property established by earlier state decisions may not be relied on, without more, as a violation of the Fourteenth Amendment. *Sauer v. New York*, 206 U. S. 536; *Chicago & Alton R. R. Company v. Tranbarger*, 238 U. S. 67."

In the landmark case of *Ohio Oil Co. v. State of Indiana*, 117 U. S. 190, 44 L. Ed. 729, the Supreme Court of the United States there sustained the constitutionality of an Indiana statute which, for the purpose of preventing wastage, prohibited the uncontrolled flow of gas or oil. The Court found that such legislation did not take private property of the owners of the land without adequate compensation. One reason, among others noted, was that the owner of the surface had no property rights in the gas and oil until the substances were actually reduced to possessions; or, in the alternative, that if the surface owner had any property right to such substances, it was a right in common with a co-equal right of other landowners to take from the common source of supply and therefore subject

to the legislative power to present the destruction of common property by one of the common owners.

The Court recognized that the same principle applied to water, also.

> "Water, also, is a mineral, but the decisions in ordinary cases of mining rights, etc., have never been held as unqualified precedents in regard to flowing or even to percolating waters. Water and oil and still more strongly gas, may be classed by themselves, if the analogy be not too fanciful, as minerals *ferae naturae*. In common with animals, and unlike other minerals, they have the power and the tendency to escape without the volition of the owner . . . They belong to the owner of the land, and are a part of it, so long as they are on or in it, and are subject to his control; but when they escape and go into other land, or come under another's control, the title of the former is gone. Possession of the land, therefore, is not necessarily possession of the gas."

And again:

> "Like water it is not the subject of property except while in actual occupancy, and a grant of either water or oil is not a grant of the soil or of anything for which ejectment will lie."

The extent of the public interest in conservation regulations of gas and oil was indicated as follows:

> "Hence it is that the legislative power, from the peculiar nature of the right and the objects upon which it is to be exerted, can be manifested for the purpose of protecting all the collective owners by

securing a just distribution, to arise from the enjoyment by them, of their privilege to reduce to possession, and to reach the like end by preventing waste."

The Court then concluded:

"In view of the fact that regulations of natural deposits of oil and gas and the right of the owner to take them as an incident of title in fee to the surface of the earth, as said by the supreme court of Indiana, is ultimately but a regulation of real property, and they must hence be treated as relating to the preservation and protection of rights of an essentially local character. Considering this fact and the peculiar situation of the substances, as well as the character of the rights of the surface owners, we cannot say that the statute amounts to a taking of private property, when it is but a regulation by the state of Indiana of a subject which especially comes within its lawful authority."

TITLE OF THE ACT IS NOT DEFECTIVE

The appellants raised this question when this case was presented to the trial court. It was not found to have any merit. Appellants did not save the question by including it in their notice of appeal, and have not included it in the five "Questions presented" as listed in their Jurisdictional Statement, page 3. The Title as well as the substance of the act shows it is a conservation statute. Since the question of the title of the act being defective has not been properly included in this appeal, appellees will not take

space in this brief to supply the authorities and arguments which fully refute appellants' contentions on this subject.

D. APPROPRIATION PERMITS UNDER THE WATER ACT OF 1945 ARE NECESSARILY GRANTED, SUBJECT TO VALID EXISTING VESTED RIGHTS, AND TO PRIOR APPROPRIATIONS, AND THE ACT PROVIDES FOR PROTECTION OF THOSE RIGHTS EITHER BY ACTION FOR DAMAGES OR BY INJUNCTION UNDER SECTIONS 82a-712 AND 82a-716.

In the District Court Judge Phillips in writing the opinion, supplied the answer to the appellants' contention that the 1945 Water Appropriation Act did not provide notice or an opportunity to have a hearing. The court herein stated:

> "It is true that the Act does not provide for notice to persons, who may be adversely affected by the granting of a permit, of the hearing or of the action by the Chief Engineer upon applications for permits. However, permits are necessarily granted subject to valid existing vested rights and to prior appropriations, and provision for the protection of those rights, either by actions for damages or for injunction, is carefully made by Sections 82a-712 and 82a-716."

The appellants have not filed any claim, statement, or demand, with the chief engineer asserting a claim to vested rights in, and to the use of, groundwater. The chief engineer, in the performance of his duty, in determinating vested rights, under section 82a-704 G. S. Kans., 1949, did not find that the appellants in this case were making any

actual beneficial use of water at the time of the passage of the act, or within three years prior thereto. A number of landowners in the Equus Beds area have made demand upon the chief engineer for a determination of vested rights comparable to what these appellants apparently are claiming. Some were notified that their respective contentions had been disallowed and have taken an appeal therefrom to the state district court. Appeals are now pending in the District Courts of Harvey and McPherson counties, Kansas, which challenge the decision of the chief engineer and which involve a construction of procedure under the act. The state court should be permitted to construe its own legislation. Under the authority of *Artesian Valley Water Conservation Assn. v. Division of Water Resources,* 174 Kan. 212, 255 Pac. 2d 1015, these appellants may still make a demand and claim, and if a negative order should be issued thereon by the chief engineer, relative to any claimed vested right, they could then seek to appeal and obtain a review thereof. In the alternative, they could pursue the remedies embraced in section 82a-712 and 82a-716, G. S. Kans., 1949.

Whatever limited property right the appellants may have had under the Kansas law, as asserted in the Soden and Peterson cases, such limited property right was, at best, the right to capture and use waters percolating and

moving under their land. Such water was and is a part of the source of supply which constitutes the vast groundwater supply known as the Equus Beds. Such limited property right of the appellants can be made the basis of a claim for a determined vested right. If the appellants choose to do so, they may proceed on the basis outlined in *Artesian Valley Water Conservation Association v. Division of Water Resources,* supra. The Kansas court has held that such a claimant may file an appeal within 30 days after the service upon such claimant, by registered mail, by the chief engineer, denying, or granting in part, any such claim. The very statute which appellants seek to have declared unconstitutional has been construed by the state court to give appellants their day in court, by following such procedure.

If the appellants fail to establish anything more than a naked right to an unused or an unusable claim, and were not making any actual use of water from this source of supply at time of passage of the 1945 act, or within three years prior thereto, and are merely asserting "a-dog-in-the-manger" right, or if they cannot, and will not use the water, but seek to prevent neighbors or adjacent landowners from making any use of this groundwater sources supply in a manner which would result in a lowering of the water table under the land of the users as well as those of the appel-

lants, then this statute covers such situation and provides that an action at law, for damages, as can be prosecuted. See 82a-716, G. S. Kans., 1949, which provides, in part:

> "If any appropriation, or the construction and operation of authorized diversion works results in an injury to any common-law claimant, such person shall be entitled to due compensation in a suitable action at law against the appropriator for damages proved for any property taken."

Furthermore, all water use appropriation permits and certificates, issued by the chief engineer, are subject to existing vested rights, and subject to superior appropriation rights. If appellants succeed in establishing a vested right or property right in any water which they can capture from under their land, or the right to the use of such water, then the statute, section 82a-712, gives the appellants with such determined vested rights, the statutory authority to enjoin appropriation diversions which impair their uses. The Appellant, Baumann, acting for himself and in behalf of his co-appellant, joined with others not involved in this litigation, in the filing of a petition with the chief engineer opposing the processing of the application of the city of Wichita, Kansas, for a water appropriation certificate. Appellants, having submitted to administrative jurisdiction under the act, are now estopped from raising the constitutional question in said proceeding, as well as in any state

court, and in any federal court. In disregard of appellants' submission to this administrative procedure under the act, these appellants now seek to raise the constitutional question under the federal constitution in this court, and likewise in an action in a state court, the Shawnee County District Court, case No. 78,885. It is manifest that this attempted appeal does not raise a meritorious question.

CONCLUSIONS

There are no questions presented in this appeal which are so substantial as to need further argument. The questions which the appellants do raise are based on the false premise as to the status or extent of their claimed property right. The five questions which they do present, all based on this false premise, are without merit. Even if the contended property right premise were found to be true, the statute is replete with adequate safeguards to meet the test of this constitutional attack, and the decision of the trial court in this case should be affirmed. We respectfully submit to the honorable court that the motion of the appellees for a dismissal or affirmance should be sustained.

Respectfully submitted,

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MOTION TO AFFIRM

28/28

FILED
SEP 6 1956
JOHN T. FEY, Clerk

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956.

No. 285.

J. H. BAUMANN and MARGUERITE MARIE JACOBSON,
Appellants,

vs.

ROBERT V. SMRHA, As Chief Engineer of the Division of Water Resources of the Kansas State Board of Agriculture, *Defendant-Appellee,*

and

THE CITY OF WICHITA, KANSAS,
a Municipal Corporation,
Intervenor-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS, THREE JUDGE COURT.

MOTION TO AFFIRM.

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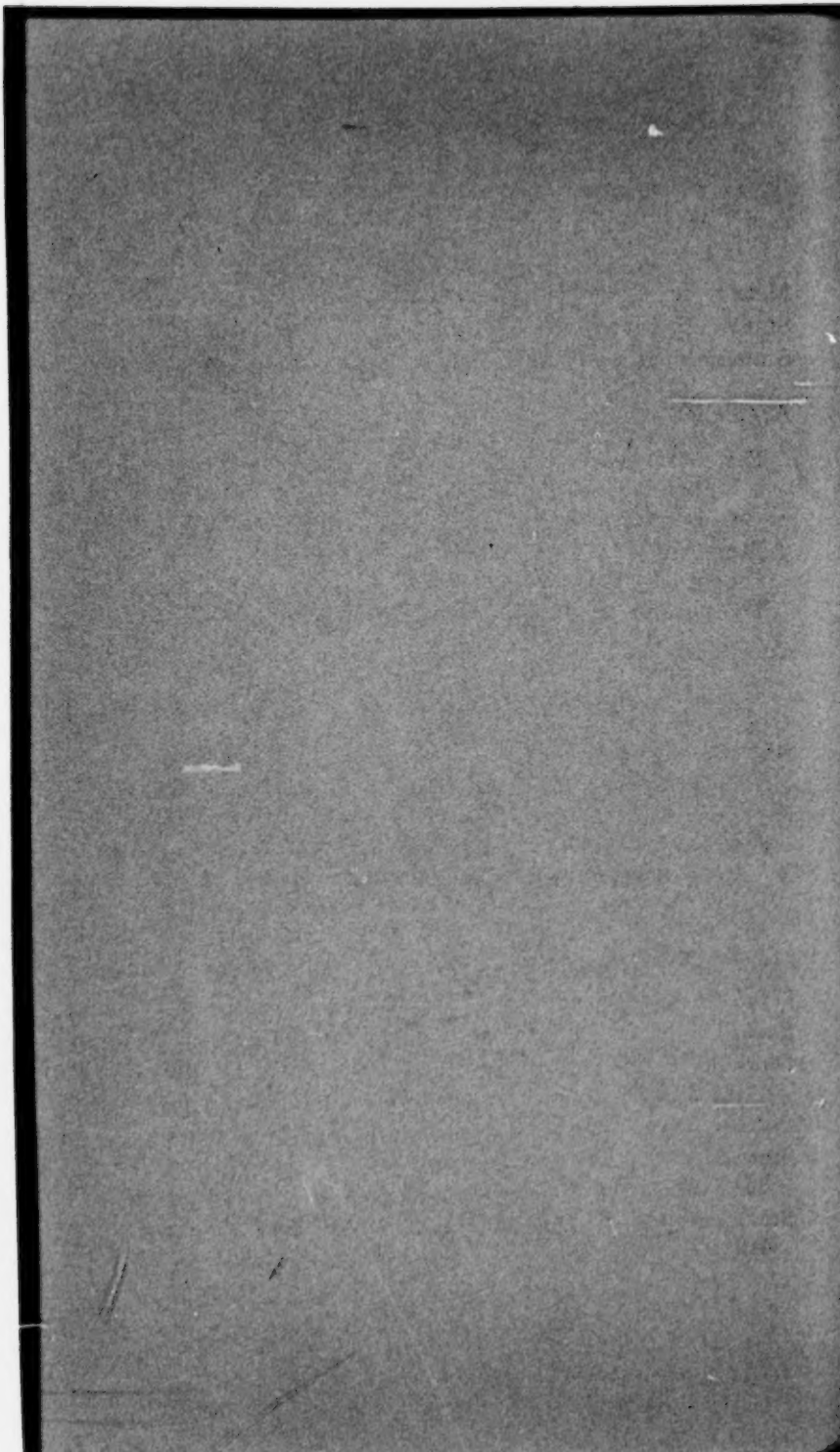

INDEX

Motion to Affirm 1
Statute Involved 2
Statement of the Case 2

Argument—

The Act Clearly and Adequately Protects Vested Rights and Is a Proper Regulatory Measure within the Police Power of the State 4
There Is No Deprivation of Appellants' Right to Recover for Land Damage 13
The Real Issue Is Factual and Local in Character 13

Conclusion 15

Table of Cases

Acton v. *Blundell*, (1843) 12 Mees. & W. 324, 152 Eng. Rep. 1223 4
Alabama Commission v. *Southern Railway*, 341 U. S. 341 14
Artesian Valley Water Conservation Association v. *Division of Water Resources*, (1953) 174 Kan. 212, 225 P. 2d 1015 14
Chasemore v. *Richards*, (1859) 7 H. of L. Cas. 349 5
City of Emporia v. *Soden*, (1881) 25 Kan. 588, Syl. 3 5
East Coast Lumber Terminal v. *Babylon*, 174 F. 2d 106 14
Ohio Oil Company v. *State of Indiana*, 117 U. S. 190, 44 L. Ed. 729 ..... 5, 11
Potts v. *Dowd*, 141 F. 2d 12 14
State ex rel. v. *Board of Agriculture*, (1944) 158 Kan. 603, 149 P. 2d 604 ..... 4, 6
State ex rel. v. *Knapp*, (1949) 167 Kan. 546, 207 P. 2d 440 6

STATUTES AND TEXTS CITED

Chap. 390 of the Session Law of Kansas of 1945 10
G. S. Kan., 1949, Sections 82a-701 through 82-721 2
G. S. 1949, 82a-701 (d) 7
G. S. 1949, 82a-701 (c) 9
G. S. 1949, 82a-702 7
G. S. 1949, 82a-703 9
G. S. 1949, 82a-704 8
G. S. 1949, 82a-705 10
G. S. 1949, 82a-707 (b) 10
G. S. 1949, 82a-707 11
G. S. 1949, 82a-708 11
G. S. 1949, 82a-709 10
G. S. 1949, 82a-711 11
G. S. 1949, 82a-712 9
G. S. 1949, 82a-716 13
G. S. 1949, 82a-719 9
G. S. 1949, 82a-719 11
1 Walsh, Commentaries on the Law of Real Property, p. 450 5
Walsh, Vol. 2, p. 616 5
3 Tiffany, Law of Real Property, 3rd Ed., p. 177 5

SUPREME COURT OF THE UNITED STATES

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No. 285.

J. H. BAUMANN and MARGUERITE MARIE JACOBSON,
Appellants,

vs.

ROBERT V. SMRHA, As Chief Engineer of the Division of Water Resources of the Kansas State Board of Agriculture, *Defendant-Appellee,*

and

THE CITY OF WICHITA, KANSAS,
a Municipal Corporation,
Intervener-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS, THREE JUDGE COURT.

MOTION TO AFFIRM.

Intervener-Appellee, The City of Wichita, Kansas, moves to affirm the judgment of the Court below on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

STATUTE INVOLVED.

Chapter 390 of the 1945 Session Laws of the State of Kansas entitled "An Act to Conserve, Protect, Control and Regulate the Use, Development, Diversion and Appropriation of Water for Beneficial and Public Purposes, and to Prevent Waste and Unreasonable Use of Water, and Amending * * *," which now appears at General Statutes of Kansas, 1949, Chapter 82a, Article 7, and herein referred to as G. S. Kan., 1949, Sections 82a-701 through 82a-721. With the exception of its title, the full text of the Act is set forth in Appellant's Jurisdictional Statement, Pages 66 through 71.

STATEMENT OF THE CASE.

The facts material to a consideration of the questions here presented are these:

Intervener-appellee, the City of Wichita, Kansas, has, since 1940, obtained its municipal water supply from a natural underground reservoir known as the "equus beds". The latter term denotes a water-bearing, geological formation with lateral dimensions of 25 miles by 55 miles, composed of extremely permeable sand and gravel and containing, under natural conditions, millions of acre feet of water.

Appellants' lands overlie the reservoir and are in the vicinity of the City of Wichita's well field. There are numerous other wells in the area, fourteen of which are located nearer to appellants' lands than the City wells. Appellants are, and have been, using water from the underground source for domestic purposes. It was also determined by the trial court that the presence of the water

beneath the surface of the land provides natural sub-irrigation. A lowering of the water table has been caused by drought and pumpage from wells operated by the City and others.

Since 1945 water usage throughout the State has been regulated and controlled under the Kansas Water Appropriation Act[1] which became effective on June 28th of that year. The Act is administered by defendant-appellee in his official capacity as Chief Engineer of the Division of Water Resources.

Appellants contend that the Act is repugnant to the due process clause of the Fourteenth Amendment in that it (1) permits a deprivation of their vested water rights, and (2) does not afford adequate protection against damage to their land resulting from the lowering of the underlying water table.

The trial court upheld the constitutionality of the Act.[2] The essence of the holding, stated in the concluding paragraph of the opinion,[3], is that the Act affords adequate protection to any vested rights which may be possessed by appellants, but that they have not seen fit to invoke the state court remedies which are afforded to them by the Act for the protection of such rights.

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[1]Jurisdictional Statement, pp. 61-71.

[2]*Ibid*, pp. 45-59.

[3]*Ibid*, p. 59.

ARGUMENT.

The Act Clearly and Adequately Protects Vested Rights and Is a Proper Regulatory Measure Within the Police Power of the State.

The six questions presented in the Jurisdictional Statement resolve themselves into the single contention that the Kansas Water Appropriation Act of 1945 unconstitutionally deprives appellants of their "vested property rights" in the water which underlies their land.

A. Prior to pointing out the provisions of the Act which negate the above contention, the physical characteristics of water in its natural state should be mentioned.

In one of the cases cited by appellant, *State ex rel.* v. *Board of Agriculture*, (1944) 158 Kan. 603, 149 P. 2d 604, the waters of this same "equus bed" reservoir were involved. In its opinion the Supreme Court of the State of Kansas approved the following as a general statement:

> "The corpus of the water in its natural state, and this includes water beneath the surface of the ground, is flowing, moving, circulating, oozing, filtering and percolating or falling from the physical confines of the realty owned by one person to the realty owned by another."

The term "ownership" as applied to percolating waters has never meant that the surface owner had a property right or proprietary interest in the corpus of the water. Historically under the English common law,[4] and Kansas de-

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[4]*Acton* v. *Blundell*, (1843) 12 Mees. & W. 324, 152 Eng. Rep. 1223.

cisions[5] the term was employed in the sense that the owner of the surface had an unqualified *privilege to extract water* underlying his land with an immunity from liability to his neighbor for doing so. Such a rule necessarily followed from the physical characteristics of water. It is incapable of possession and ownership until it is extracted. Like the case of oil and gas, the "rule of capture" applies. As was said by the Court in *Ohio Oil Company* v. *State of Indiana,* 117 U. S. 190, 44 L. Ed. 729, after having observed the migratory tendencies of oil, gas and water:

> "They [such minerals] belong to the owner of the land, and are a part of it, so long as they are on or in it, and are subject to his control, but when they escape and go into another land, or come under an-

---

Lord Chief Justice Tindal: "[the case] rather falls within that principle, which gives the owner of the soil all that lies beneath his surface; that the land immediately below is his property, whether it is solid rock, or porous ground, or venous earth, or part soil, part water; that the person who owns the surface may dig therein, and apply all that is there found to his own purposes at his free will and pleasure; and that if, in the exercise of such right, he intercepts or drains off the water collected from underground springs in his neighbour's well, this inconvenience to his neighbour falls within the description of *damnum absque injuria,* which cannot become the ground of an action."

See also: *Chasemore* v. *Richards,* (1859) 7 H. of L. Cas. 349.

[5]*City of Emporia* v. *Soden,* (1881) 25 Kan. 588, Syl. 3:

"Underground Percolating Water, Use of; Limit. While the general doctrine in respect to underground water percolating through the soil is, unquestionably, that the owner of the land may appropriate it to any use, and in any amount, and without reference to the effect of such appropriation upon his neighbor's land or supply of water, yet it is limited to this extent, that he may not thus indirectly destroy or diminish the flow of a natural surface stream to the injury of a riparian owner thereof."

See, also:

1 Walsh, Commentaries on the Law of Real Property, p. 450.

Walsh, Vol. 2, p. 616.

3 Tiffany, Law of Real Property, 3rd Ed., p. 177.

> other's control, the title of the former is gone. Possession of the land, therefore, is not necessarily possession of the gas."

Thus the only "property right" available to appellants, or anyone else for that matter, is a *right of use.*

B. The Supreme Court of the State of Kansas in *State ex rel.* v. *Knapp,* (1949) 167 Kan. 546, 207 P. 2d 440, held the Kansas Act to be constitutional. In so deciding the Court rejected the dicta stated in its earlier decision in *State ex rel.* v. *State Board of Agriculture, supra,* which is relied upon by appellants. As observed by the trial court in the instant case, the Knapp case overruled the earlier decision:

> "Whether such a change in the law of Kansas is contrary to earlier decisions of the Supreme Court of Kansas, it is cognizant with the latest decision of the Supreme Court of Kansas in *State* v. *Knapp,* 167 Kan. 546, 207 P. 2d 440, which must be regarded as having overruled the earlier cases."[6]

The opinion in the Knapp case frankly states that the Act forms the basis for a different approach to the solution of questions concerning water rights than the Court had followed in some of its prior opinions. Further, after having noted that the legislature is not bound to adhere to old common law doctrines, the Kansas Court stated:

> "We also take note of the fact that if the statutes here under consideration make any change in the common law rights of riparian owners, our statutes (G. S. 1935, 77-109) effective since 1868 (G. S. 1868, Chap. 11a, Section 3) authorize the legislature to do so."

The reasons why the departure from the common law was approved and the public need for such change are forcefully stated in the following quotation from the opinion:

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[6]Jurisdictional Statement, p. 58.

"Heretofore we have approached the questions largely on the basis of individual interests alone. Under this declaration and other provisions of the Act we now approach them upon the basis of the interest of the people of the state without losing sight of the beneficial use the individual is making or has the right to make of the water. Unused or unusable rights predicated alone upon theory become of little if any importance. Broad statements found in some of our opinions, such as 'Every man through whose land a stream of water runs is entitled to the flow of that stream without diminution or alteration' (*Shamleffer* v. *Peerless Mill Company,* 18 Kan. 24), must be disregarded or modified to harmonize with this declaration. The change is an appropriate one for the legislature to make. Individuals do not live alone in isolated areas where they, at their will, can assert all of their individual rights without regard to the effect upon others."

The Court observed that "the heart" of the Statute is G. S. 1949, 82a-702, which declares:

"All water within the State of Kansas is hereby dedicated to the use of the people of the State, subject to the control and regulation of the State in the manner herein prescribed."

C. Under the Kansas statute, any person who had been using water within three years prior to the 1945 Act is granted a right to continue such use. Such is denominated a "vested right" and is statutorily defined at G. S. 1949, 82a-701 (d), as follows:

" 'Vested Right' means the right to continue the use of water having actually been applied to any beneficial use at the time of the passage of this act or within three years prior thereto to the extent of the existing beneficial use made thereof, and shall include the right to take and use water for beneficial purposes

> where a person is engaged in the construction of works for the actual application of water to a beneficial use at the time of the passage of this act, provided such works shall be completed and water is actually applied for such use within a reasonable time thereafter."

It is noteworthy that the Act itself is not the *source* of vested rights. The extent of pre-1945 usage is a *question of fact*, the determination of which is made an administrative function of defendant-appellee The Chief Engineer of the Division of Water Resources. His powers and directions in such respect are found at G. S. 1949, 82a-704:

> "* * * As soon as practicable after the passage of this Act, the Chief Engineer or his authorized representatives shall proceed with the necessary steps to gather data and other information as may be essential to the proper understanding and determination of the vested rights of all parties using water for beneficial purposes other than domestic. Such observations and measurements shall be reduced to writing and made a matter of record in his office."

After the foregoing has been accomplished, the above section of the statute requires that the Chief Engineer:

> "* * * shall then make an order determining and establishing the rights of all persons making beneficial use of water on the effective date of this Act and the then extent of their uses and shall notify all such water users as to the contents of such order; service of such notice shall be deemed complete upon depositing such notice in the post office as registered mail addressed to such water user at his last known post office address."

That administrative determination of the Chief Engineer, however, is not final. The right of appeal to State District Court is expressly allowed by the same section:

> "The order or determination of the Chief Engineer shall be in full force and effect from the date of its entry in the records of his office, unless and until the operation shall be stayed by an appeal therefrom by such user to the District Court in the County in which the point of diversion of such use is located."

The adjudication of vested rights by the State District Courts supersedes the Chief Engineer's administrative determination under the provisions of G. S. 1949, 82a-719:

> "Distribution of Water According to Decree of Court. Whenever the rights for the use of waters of the state shall have been adjudicated by any court, the division of water resources with the aid of its chief engineer and other officers and employees, shall aid in the distribution of such water according to such decree and shall distribute the water among the several ditches or water users pursuant to the decree."

The extent of protection afforded such vested rights is found at G. S. 1949, 82a-703:

> "* * * nothing in this Act contained shall impair the vested right of any person except for non-use."

The remedy of injunction is expressly provided by G. S. 1949, 82a-712:

> "* * * provided that common law users with determined vested rights as herein defined may enjoin diversions which impair such uses."

The statute provides express protection for a domestic use (admittedly held by appellants) which is accorded the highest priority classification. Definition of that term is found at G. S. 1949, 82a-701 (c):

> " 'Domestic use' means the use of water for household purposes, the watering of live stock, poultry, farm and domestic animals and the irrigation of gardens and lawns."

The Statute goes on to provide that such domestic uses are exempt from the requirement that appropriation permits must be obtained therefor. To such effect G. S. 1949, 82a-705, reads:

> "Permit to Acquire an Appropriation Right to Water. No person shall have the power or authority to acquire an appropriation right to water without first obtaining the approval of the Chief Engineer; provided, however, that this Section shall not apply to persons using water for domestic uses."

The Act further stipulates that if there is a conflict between appropriations for different purposes, domestic users shall be accorded first priority.[7]

D. The primary purpose of the Act is that of regulation of water usage to the end of preventing waste. Such is indicated by its title which reads:

> "An Act to Conserve, Protect, Control and Regulate the Use, Development, Diversion and Appropriation of Waters for Beneficial and Public Purposes and to Prevent Waste and Unreasonable Use of Water."[8]

Under the Act all persons (other than domestic users and those possessing vested rights) who desire to utilize natural water sources must apply for and obtain an appropriation permit from the defendant Chief Engineer.[9] If, (a) the application contemplates the utilization of water for beneficial purposes within reasonable limitations; (b) the proposed use does not conflict with an existing use, and (c)

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[7]G. S. 1949, 82a-707 (b): "Where appropriations of water for different purposes conflict they shall take precedence in the following order, namely: Domestic, municipal, irrigation, industrial, recreational and water power uses."

[8]Chap. 390 of the Session Laws of Kansas of 1945.

[9]G. S. 1949, 82a-709.

the proposed use does not prejudicially affect the public interest, it is the *duty* of the Chief Engineer to approve the application and grant the permit.[10] If the Chief Engineer improperly or erroneously refuses the permit, the rejected applicant may have his day in court by appeal to the State District Court[11] and the adjudication of that tribunal is binding on the Chief Engineer and all water users.[12]

When allocated, appropriations do not constitute absolute ownership of water but remain always subject to the principle of beneficial use, G. S. 1949, 82a-707:

> "Such appropriations shall not constitute absolute ownership of such water, but shall remain subject to the principle of beneficial use."

E. It has long been established that regulatory measures of the type here in question are a proper and reasonable exercise of the police powers of the several respective states. A cogent expression of the underlying principles involved is found in the landmark case of *Ohio Oil Co.* v. *State of Indiana.*[13]

The Supreme Court of the United States there sustained the constitutionality of an Indiana statute which, for the purpose of preventing wastage, prohibited the uncontrolled flow of gas or oil. The Court found that such legislation did not take private property of the owners of the land without adequate compensation. One reason, among others noted, was that the owner of the surface had no property rights in the gas and oil until the substances

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[10]G. S. 1949, 82a-711.

[11]G. S. 1949, 82a-708.

[12]G. S. 1949, 82a-719.

[13]*Infra*, p. 5.

were actually reduced to possession; or, in the alternative, that if the surface owner had any property right to such substances, it was a right in common with a co-equal right of other landowners to take from the common source of supply and therefore subject to the legislative power to present the destruction of common property by one of the common owners.

In the opinion written by Mr. Justice White the then current misconception of the nature of the rights of surface owners was stated in the following language:

> "In other words, the fallacy arises from considering that the means which the owner of land has a right to use to obtain a result is in legal effect the same as the result which may be reached."

The applicability of the court's reasoning to water rights is, of course, obvious. In developing the subject the Court recognized the migratory characteristics of water, oil and gas.[14]

And stated that:

> "Like water it [gas] is not the subject of property except while in actual occupancy, and a grant of either water or oil is not a grant of the soil or of anything for which ejectment will lie."

The extent of the public interest in conservation regulations of gas and oil was indicated as follows:

> "Hence it is that the legislative power, from the peculiar nature of the right and the objects upon which it is to be exerted, can be manifested for the purpose of protecting all the collective owners by securing a just distribution, to arise from the enjoyment, by them, of their privilege to reduce to possession, and to reach the like end by preventing waste."

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[14]See quotation from the opinion, *infra*, p. 5.

The Court then concluded:

> "In view of the fact that regulations of natural deposits of oil and gas and the right of the owner to take them as an incident of title in fee to the surface of the earth, as said by the supreme court of Indiana, is ultimately but a regulation of real property, and they must hence be treated as relating to the preservation and protection of rights of an essentially local character. Considering this fact and the peculiar situation of the substances, as well as the character of the rights of the surface owners, we cannot say that the statute amounts to a taking of private property, when it is but a regulation by the state of Indiana of a subject which especially comes within its lawful authority."

There Is No Deprivation of Appellants' Right to Recover for Land Damage.

A. If appellants' position is that they are divested of the right to recover for land damage resulting from a lowered water table, again the contention is answered by the plain provisions of the Act, G. S. 1949, 82a-716, of which reads:

> "If any appropriation results in an injury to any common law claimant, such person shall be entitled to due compensation in a suitable action at law against the appropriator for damages proved for any property taken."

The Real Issue Is Factual and Local in Character.

A. There is nothing in the Act itself which denies appellants the right to use water. They, in effect, are asking the Federal courts to assume that the Kansas courts and administrative officials, if given the opportunity, would wrongfully deny their claim of vested rights (other than domestic, concerning which there is no dispute). The issue which they present is therefore essentially fac-

tual and local in character, *i. e.*, whether appellants actually had been making any beneficial use of water prior to June 28, 1945. Although it is true that such does not constitute an absolute bar against entertainment of the action by the Federal courts, the authorities generally recognize that under established principles of comity, the Federal courts often decline suits where the petitioner has failed to pursue his local remedies.[15]

If appellants have *in fact* a vested water use right, it must be presumed that the defendant Chief Engineer and/or the Courts of the State of Kansas will so determine. Appellants, however, have not presented either that administrative officer or the Kansas courts with such opportunity.

In *Artesian Valley Water Conservation Association* v. *Division of Water Resources,* (1953) 174 Kan. 212, 225 P. 2d 1015, the defendant-appellee, Chief Engineer, had made a vested right survey of percolating ground waters. His determination and designation of those holding vested rights by reason of prior use did not include one, Lockhart, a landowner and one of the plaintiffs in the action. The latter then filed a statement with the Chief Engineer claiming that because of his prior use he had a vested right. Tne Chief Engineer made a further investigation

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[15]*Potts* v. *Dowd,* 141 F. 2d 12:

"That a proper and decent sense of comity demands that petitioner present his application to the state court in the first instance rather than resort to a plea to the federal court to intervene in or review the administration of statutory duties of state authorities."

To the same effect *East Coast Lumber Terminal* v. *Babylon,* 174 F. 2d 106.

Also *Alabama Commission* v. *Southern Railway,* 341 U. S. 341:

"Whatever rights appellee may have are to be pursued through the state courts."

and determined that Lockhart did not have a vested right. The Supreme Court of the State of Kansas held that Lockhart was entitled to notice of the Chief Engineer's determination in order that he, Lockhart, might take an appeal to the District Court as provided by the Act. The Court in its opinion recognized not only the landowner's *right* to pursue his statutory appeal, but also his *obligation* to do so. In that connection the opinion states:

> "Factually it appears that service of the notice was never completed in a statutory manner. The result is that Lockhart, the water user, has never been placed in a position where he must have appealed and thus have exhausted his remedy in the ordinary course of the law."

So, in the instant case, the same remedy is open to appellants. They have chosen, however, to resort to the Federal courts. There has not been nor can there be any deprivation of the due process to which appellants are entitled. The Act provides them the fullest and most adequate remedies for the protection of those rights.

CONCLUSION.

In sum, it appears (1) that inasmuch as appellants' domestic use rights are accorded the highest priority classification by the Act, they are fully safeguarded against deprivation or impairment; (2) if appellants claim any other type of vested rights, they should be required to pursue their remedy for a determination to such effect through the administrative agency of the defendant-appellee Chief Engineer of the Division of Water Resources and if dissatisfied with his findings, thence through the Courts of the State of Kansas and (3) if alleged land damage resulting

from a lowered water table is the complaint of appellants, they have under the Kansas Statute an express right of recovery therefor by an action at law.

It is respectfully submitted that appellants present no substantial questions which merit further argument and that accordingly the judgment of the trial court should be affirmed.

Respectfully submitted,

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285

September 8, 1956

Clerk U. S. Supreme Court
Supreme Court Building
Washington, D. C.

Re: Baumann, et al
vs. Smrha, et al.
No. 285

Honorable Sir:

In the belief that the Jurisdictional Statement sufficiently answers the contentions of the appellees in their respective motions to dismiss or affirm, appellants hereby expressly waive the right to file an answer brief to such motions.

In connection with appellee Smrha's contention that appellants did not properly save the question of "Title of the Act" by including it in their Notice of Appeal and in their Questions Presented as listed in their Jurisdictional Statement; however, appellants respectfully submit the Title of the Act was clearly included in question No. 2 of the Questions Presented and similarly included it in the Notice of Appeal.

Respectfully submitted,

Kenneth Speir

OF SPEIR, STROBERG & SIZEMORE

KGS:e

cc - Robt. B. Morton
One of the Counsel for
Wichita, Kansas

John Anderson, Jr., Atty. Gen.
One of the counsel for
Robert V. Smrha

COPY

Herbert H. Sizemore for appellants. *John Anderson, Jr.*, Attorney General of Kansas, *Paul E. Wilson*, Assistant Attorney General, and *Warden L. Noe*, Special Assistant Attorney General, for Smrha, and *Robt. B. Morton* and *Paul J. Donaldson* for the City of Wichita, appellees. Reported below: 146 F. Supp. 617.

Miscellaneous Order.

No. 285. BAUMANN ET AL. *v.* SMRHA, CHIEF ENGINEER, DIVISION OF WATER RESOURCES, KANSAS STATE BOARD OF AGRICULTURE, ET AL. Appeal from the United States District Court for the District of Kansas. *Per Curiam:* The motion to affirm is granted and the judgment is affirmed. MR. JUSTICE REED and MR. JUSTICE DOUGLAS would note probable jurisdiction. *Kenneth G. Speir* and